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DIGEST

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APRIL 1982

Volume 2, No. 7

MAY 1982

Volume 2, No. 8

JUNE 1982

Volume 2, No. 9

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Volume 2, No. 10

**UNITED STATES MERIT SYSTEMS
PROTECTION BOARD**

Washington, D.C. 20419

United States Merit Systems Protection Board

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CONTENTS

APRIL CASES

Adverse Actions

DRAYTON, Thomas E., Sr. v. Equal Employment Opportunity Commission	1
HICKMAN, Charles B. v. Department of Justice	1
IBARRA, Alfredo A. v. Department of the Air Force	2

Annuities

ANDERSON, Charles E. v. Office of Personnel Management	3
--	---

Disability Retirement

LIPSCOMB, Carolyn J. v. Office of Personnel Management	4
--	---

OTHER APRIL ISSUANCES	5
---------------------------------	---

MAY CASES

Adverse Actions

ALLEN, Leon, et. al. v. Department of the Army	9
DEAL, Jerry v. Department of Justice.	9
GILLEY, Jerry A. v. Department of Justice	10
KUFEL, Jeffrey v. U.S. Postal Service	11
LUNDY, Harry v. Department of the Navy	11
MILLER, James E. v. Department of the Navy	12
THOMPSON, Gene v. Smithsonian Institution	13

Acceptable Level of Competence

DAY, Wilma N. v. U.S. Department of Agriculture	13
MATTERSDORF, Werner R. v. Department of Health and Human Services	13

Air Traffic Controllers

KETCHEM, John C. v. Department of Transportation, Federal Aviation Administration	14
---	----

Annuities

EDWARDS, Leverett v. Office of Personnel Management	15
---	----

Attorney Fees

In the Matter of: Honorable Drew Lewis, Secretary, Department of Transportation, et al.	16
---	----

Disability Retirement

DALEY, Mary Jane v. Office of Personnel Management	16
--	----

OTHER MAY ISSUANCES	17
-------------------------------	----

JUNE CASES

Adverse Actions

BROWN, Bruce v. Department of Justice, Immigration and Naturalization Service, (See Martin)	
CHAREST, Daniel v. Department of Justice, Immigration and Naturalization Service, (See Martin)	
DICK, Dirk A. v. Department of Justice, Immigration and Naturalization Service, (See Martin)	
KOMORA, Diane T. v. Veterans Administration	22
MARTIN, Harold W. v. Department of Treasury, U.S. Customs Service.	22
MAXFIELD, Alan A. v. Department of Transportation	23
OTHERSON, Jeffrey v. Department of Justice, Immigration and Naturalization Service, (See Martin)	
WILSON, George H. v. Department of the Navy	24

OTHER JUNE ISSUANCES	26
----------------------------	----

JULY CASES

Adverse Actions

DOBROSKI, Ronald A. v. Department of Justice, U.S. Marshals Service	30
MONCZEWSKI, Bernard v. Department of the Air Force	30
SHOWS, Timothy v. Department of the Air Force (See Monczewski)	
SMITH, Gerald v. Department of the Air Force (See Monczewski)	
VAUGHN, Thomas v. Department of the Air Force (See Monczewski)	

Attorney Fees and Disability Retirement

VERGAGNI, Roland E. v. Office of Personnel Management	31
---	----

OTHER JULY ISSUANCES	33
----------------------------	----

Index

Notes on Key Numbers	37
Major Topics and Scope Notes	37
Outline of Topics (With Key Numbers)	39

FOR YOUR INFORMATION	53
----------------------------	----

DEFINITIONS	54
-------------------	----

APRIL CASES

ADVERSE ACTIONS

THOMAS E. DRAYTON, SR. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Docket No. AT07528110105)
April 6, 1982

1.110; 1.120; 1.343; 1.344; 1.400; 1.410; 1.420; 3.120; 14.700

Appellant was removed based on a charge of fraud through the unauthorized use of a U.S. Government credit card. The agency charged the appellant with fraud for using a government credit card on two occasions to pay for gasoline that was put into his personal vehicle. The appellant did not deny this conduct but offered an explanation. The presiding official upheld the removal and the appellant petitioned for review of the presiding official's decision.

The explanation offered by the appellant was that on one of the occasions he used a government vehicle and, while in the field, he discovered the car was low on fuel. He filled the vehicle with gasoline and then he was told that he could not charge the purchase. The service station owner, by affidavit, testified that he does not accept credit cards. Appellant paid out of his own cash and, as a method of reimbursement, later that day put an amount equal to the payment he had made in his own vehicle and charged it to the government credit card at a gasoline station that would accept the credit card. Appellant contended that all circumstances in the second incident were the same except that on this occasion the credit card was missing from its case in the government vehicle. The contention was corroborated by the affidavit of the second service station owner.

Appellant's first explanation of using this method for reimbursement was that officials in the agency's finance branch told him that he could not be reimbursed from the imprest fund since he was cashier. Therefore, he felt that he had no alternative but to buy gasoline with the government credit card for reimbursement. His second explanation was that he had a memo from a supervisory attorney authorizing him to

use this reimbursement procedure. The Board found neither of these explanations adequate.

The Board, as well as the presiding official, found that there was a method whereby appellant could have been reimbursed by the agency's motor pool. Although appellant was unaware of this procedure, the Board felt that he could have learned about it through inquiry. In addition, the Board found that the memorandum did not authorize the procedure appellant followed. The memorandum authorized him to use his personal vehicle on government business, and to use the credit card for gasoline purchases.

The Board has held that the element of knowledge necessary to sustain a charge of fraud is established when the person in question ought to know, has a duty to know, or has the means of knowing the truth. *Barrett v. Air Force*, MSPB Order No. DC07528010046 (February 20, 1981). The Board felt that appellant knew that he was using an unofficial method to reimburse himself and, therefore, found it necessary to falsify credit card receipts to effect this method (on both occasions the license plate number of appellant's personal vehicle had been scratched out and the license plate number of a government vehicle had been entered). The Board, therefore, sustained the charge.

However, the Board found the penalty of removal unreasonably harsh. The Board held that the seriousness of fraud against the government was mitigated by the surrounding circumstances and that the appellant did not profit from his conduct, but, instead, was merely trying to get repaid for expenditures that he had made on behalf of the agency. However, the Board felt that the offense entailed a serious lack of judgement on the appellant's part, and that a 30-day suspension was the maximum reasonable penalty for his misconduct.

Accordingly, the initial decision was affirmed as modified and the agency was ordered to cancel appellant's removal action and substitute a 30-day suspension without pay.

CHARLES B. HICKMAN v. DEPARTMENT OF JUSTICE (Docket No. DA075209113)
April 19, 1982

1.330; 1.340; 1.346; 1.400; 4.120; 4.125; 8.230

Appellant was removed from a position with the federal prison system on charges of removing contraband from the grounds of a federal correctional institution and of theft of money from an inmate. The presiding official, in the initial decision, sustained the first charge only. He reversed the agency action, stating that removal of appellant was too harsh in relation to the charge sustained and thus did not promote the efficiency of the service. In an analysis of the facts, the presiding official found that appellant was authorized to collect and hold the prisoner's money and that he had removed it from the prison to ensure its safekeeping. Therefore, the presiding official did not sustain the charge of theft.

In its petition for review, the agency argued that the presiding official incorrectly interpreted 5 U.S.C. 7513 and 18 U.S.C. 4082 in concluding that appellant's removal of contraband from the prison did not justify the agency's decision to remove the him.

The Board agreed with the presiding official's decision sustaining the charge that appellant removed contraband from the prison. The Board felt that the propriety of the penalty imposed by the agency in relation to the charge sustained had to be reviewed in light of the Board's decision in *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981). In *Douglas*, the Board held that it had authority to mitigate penalties when it determined that the agency-imposed penalty was clearly excessive, disproportionate to the sustained charges, arbitrary, capricious, or unreasonable.

In this case, the Board believed the penalty of removal to be reasonable and appropriate. The Board also believed that the most important consideration in this case was that appellant was employed as a law enforcement official, a position of great trust and responsibility, and thus had to conform to a higher standard of conduct than non-law enforcement employees.

The associate warden stated that, in his opinion, this incident destroyed appellant's credibility with the prisoners. The severity of appellant's misconduct was also reflected by 18 U.S.C. §1791 which potentially provides for a ten year prison sentence for removing contraband from a prison.

Accordingly, the presiding official's decision was reversed and the agency penalty removing appellant was affirmed.

ALFREDO A. IBARRA v. DEPARTMENT OF THE AIR FORCE (Docket No. SF07528010433)

April 14, 1982

1.363; 1.369; 1.400; 1.410; 8.230; 10.1112; 10.130; 14.700

Appellant was removed from the position of civilian guard at a military institution based on a charge that he had failed to report for weapons qualification training as directed by his superiors. In determining the penalty, the agency also considered an earlier reprimand issued to appellant for an unrelated type of offense. The presiding official affirmed the removal.

In his petition, appellant first attempted to reargue the merits of the charge against him, contending that the evidence did not support insubordination. However, based on the Board's examination of the initial decision and the record, the Board found no error in the presiding official's finding. Appellant's other contention was that the penalty was too severe and requested the Board to reduce it.

The record revealed that appellant was required to carry a revolver in the course of his duties. In order to be authorized to carry his revolver, appellant was required annually to complete weapons qualification training successfully, which included range firing his revolver. Appellant had failed his weapons qualification and was twice ordered, in writing by his military supervisors, to report for weapons qualification. He refused to report, forming the basis of the specifications supporting the charge of insubordination.

Appellant contended that any orders from his military supervisors, at that time, were not lawful orders because he had a valid authorization from the installation commander. He argued that his military superiors were attempting to countermand their superior's orders. Appellant also asserted that he and two others who had failed weapons qualification were given a 90-day extension and that this was the basis for his refusal to attempt to qualify before the expiration of the extension.

In considering the appropriateness of the penalty, the presiding official determined that although two incidents of alleged insubordination were cited, the charge must be considered as one offense. Since no disciplinary action had been imposed for the first incident, the presiding official considered that the penalty range for a first offense, which was reprimand to removal, as set out in the agency's penalty guide, was applicable. The Board agreed, stating that an agency cannot increase the severity of the penalty in this or similar types of cases where it may reasonably antici-

pate that the order will not be obeyed. The two incidents of disobedience were therefore merged into one offense for the purpose of determining the maximum appropriate penalty. In considering all relevant factors in this case, the Board concluded that the penalty of removal was unreasonable and that a 60-day suspension would be the maximum reasonable penalty.

Accordingly, the initial decision was affirmed as modified and the agency was ordered to cancel the removal and substitute a 60-day suspension in its place.

ANNUITIES

CHARLES E. ANDERSON v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. AT08318110438)
April 7, 1982

1.111; 14.000000; 15.110; 15.200; 15.300

The Office of Personnel Management (OPM) petitioned for review of a Regional Office decision reversing its determination that appellant was not eligible for a discontinued service annuity. (At issue was whether appellant resigned involuntarily, after being faced with reassignment, and thus was entitled to a discontinued service annuity, or whether he left voluntarily and was not, therefore, so entitled.) The presiding official in his consideration of the case applied a sanction against OPM pursuant to 5 C.F.R. §1201.43 and struck all OPM submissions. The presiding official only considered the OPM reconsideration decision, concluded that OPM had not demonstrated the basis for its reconsideration decision, and found that appellant was entitled to discontinued service annuity.

In its petition for review, OPM asserted that the record demonstrated that the presiding official's decision was erroneous. OPM argued again that the appellant's resignation was voluntary, that the reassignment was excessively forceful, and that the appropriate remedy would be cancellation of the separation as a violation of part 752.

The Board stated that the sanction applied against OPM by the presiding official was proper and appropriate, that the agency twice failed to comply with the presiding official's direction to submit the record, and was well over a month late responding to the second order. The Board has consistently held that the sanction of striking the agency submission is warranted under these circumstances. *See, e.g. Julson v. Office*

of Personnel Management, MSPB Order No. CH831L09013 (September 22, 1981).

In determining that the presiding official's interpretation of the law and guidance provided in FPM Supplement 831-1, was not erroneous, the Board noted 5 U.S.C. §8336(d) which provides that an employee who has attained certain age and service requirements and who is separated involuntarily, except by removal for cause, is entitled to an annuity. FPM Supplement 831-1, S11-2(e) provides that separation of an employee who receives a notice that reassignment is being directed outside the commuting area is involuntary. Thus, agreeing with the presiding official, the Board found this guidance applicable.

The Board found that OPM's assertion that the resignation was in fact voluntary because it was not coerced was misplaced in this case, since the issue dealing with voluntariness as pertaining to separation in lieu of an adverse action was not dealt with here. The Board found, rather, that the circumstances surrounding the separation itself and not the means effecting it were dealt with. The Board concluded that it was therefore immaterial whether appellant desired to submit his resignation. The Board felt that what was relevant was the directed reassignment and the separation in lieu thereof.

Furthermore, the Board found that whether or not the agency ratified the resignation was likewise irrelevant. As stated at 5 C.F.R. §715.202(a), an employee is free to resign at any time, to set the effective date, and to have the reasons for his resignation entered in the official records. 5 C.F.R. §715.202(b) states that withdrawal is at the discretion of the agency before it becomes effective. Courts have held that resignation results in the employee's complete separation which after it becomes effective may not be revoked at the employee's option. The Board held that a resignation is an employee-initiated action and there is nothing in law or regulation that permits an agency to revoke resignations at will after their effective date.

Finally, with respect to the allegedly forceful nature of the directed reassignment, the Board again noted that this concern was not relevant to the matter of whether the separation was involuntary under the circumstances provided for in law and FPM Supplement 831-1.

The Board found that the facts showed appellant's situation met the criteria for discontinued service annuity and ordered the agency to grant the appellant's discontinued service annuity.

DISABILITY RETIREMENT

CAROLYN J. LIPSCOMB v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. AT831L8110394)

April 6, 1982

4.000000; 4.120; 4.127; 10.1322; 14.400; 15.130;
15.131

Appellant appealed the reconsideration decision of the Office of Personnel Management (OPM) denying her application for disability retirement. Following a hearing, the presiding official issued an initial decision sustaining OPM's disallowance.

In the initial decision, the presiding official found that appellant had not established that her pain nor the causative conditions were totally disabling, and that it was unnecessary to decide whether or not there was a medically caused deficiency in service. The Board has held that the ultimate determination of total disability is to be based on the probative value of *all* of the evidence which includes all evidence relating to the effect of the appellant's condition upon his or her ability to perform in the grade or class of position last occupied.

At the hearing, both treating doctors testified that appellant was totally disabled and otherwise supported and elaborated on their previous explanations of appellant's condition and its effect on her ability to perform the duties of her position. One of the doctor's testified that, based on appellant's job description and her knowledge of appellant's medical condition, the pain would affect the quality and quantity of appellant's work on that job. The doctor also stated that appellant's condition caused a deficiency in her work and that, due to degenerative processes, she believed appellant's condition would not improve but would worsen and that in her opinion appellant was totally disabled.

Based upon the evidence, the Board found that appellant had shown, by a preponderance of the evidence, that she was totally disabled within the meaning of 5 U.S.C. §8331(6) and, therefore, was entitled to a disability retirement annuity under 5 U.S.C. §8337.

Accordingly, the initial decision was reversed and the Office of Personnel Management was ordered to grant appellant's application for disability retirement.

OTHER APRIL ISSUANCES

PETITIONS FOR REVIEW DENIED

AIKEN, Ruby B. v. Office of Personnel Management (AT831L8110019)
ALTSTADT, Wayne F. v. U.S. Postal Service (CH07528110063)
ARCHIMEDES, Verdum v. Veterans Administration (SF315H09008)
BANKS, Ruth A. v. U.S. Postal Service (AT03538110575)
BATES, Ivory v. Office of Personnel Management (CH831L8110224)
BELTON, Benjamin v. Department of the Navy (AT07528090171)
BORNINKHOF, Wesley J. v. Department of Justice (SF07528090008ADD)
BURG, Frank L. v. Department of Labor (CH07528110622)
CHOSTNER, Carol v. Department of the Navy (SF07528111862)
CONRAD, Barbara J. v. Department of Agriculture, Forest Service (CH315H81110615)
CORNELIUSEN, Mary T. v. Veterans Administration (BN07528110017)
CROUCH, Ralph D., Appellant v. Veterans Administration, Respondent (DA07528110234)
CUMMINGS, Russell N. v. Department of the Navy (PH315H8110531)
CURTIS, Thomas P. v. Office of Personnel Management (DC831L8110206)
DONOHUE, Timothy P. v. U.S. Postal Service (SF03538110795)
DORAN, Omer L. v. Department of the Interior (CH07528010102)
EDWARDS, Alfonza v. Department of the Air Force (AT03518110091)
EGAN, John S. v. Department of the Navy (SE07528110047)
EGGELSTON, Elaine F. v. Health and Human Services (PH07528110112)
ELLIOT, Frederick L. v. U.S. Postal Service (SF07528111370)
EVANS, John A. v. District of Columbia Government, Department of Human Resources (DC07528090121)
FELTON, Alvin v. Department of Labor (CH07528010005ADD)
FILION, Alfred E. v. Department of the Navy (BN07528010013)
FINKIE, Rachael S. v. Department of the Navy (AT03418110227)
FONOTI, Faleupolu v. Department of the Navy (SF07528110352)
FORD, Willie D., Jr. v. Department of the Army (CH07528110603)

FRAZIER, Geraldine B. v. Defense Mapping Agency (DC07528090100)
GIPSON, Alice v. Health and Human Services, Social Security Administration (CH07528010082)
GOFF, Myron v. Department of the Treasury, Internal Revenue Service (CH07528110092)
GUERRERO, Frank v. Department of the Navy (SF07528010018)
HAISTEN, Jeanne C. v. Department of the Air Force (SF07528090029ADD)
HALE, Donald, Jr. v. Department of the Air Force (DA07528110141)
HAMMONDS, Alma S. v. Health and Human Services (SL07528110001)
HARSHA, David M. v. U.S. Postal Service (CH07528110297)
HATCHER, William B. v. Department of the Air Force (AT07528010257)
HIPOLITO, Gregorio C. v. Department of the Navy (SF07528010085)
JACKSON, Delbert L. v. Department of the Air Force (DA07528110177)
JAIN, Roshan L. v. Health and Human Services (DA07528110343)
JOHNSON, Evelyn V. v. Department of the Air Force (SF035109019)
JOHNSON, Ishmael v. Equal Employment Opportunity Commission (DA07528010263)
JOHNSON, Sylvia R. v. Department of the Army (SF07528111369)
JOSEPH, Arthur v. U.S. Merit Systems Protection Board (HQ030009024)
KIMPEL, Edward F. v. Department of the Army (CH07528110198)
KISSNER, Edward A. v. Veterans Administration (NY07528110146)
LANCELOTTI, Albert D. v. Office of Personnel Management (PH08318110415)
LYNCH, Jerry v. U.S. Postal Service (DE07528110301)
MANNING, Kathryn M. v. Department of the Air Force (AT531D8110148)
MARTINEZ, Alejandro v. Department of the Air Force (DA07528110527)
MASSEY, John R. v. General Services Administration (DC075209244)
MATEJIK, Helen M. v. Veterans Administration (AT07528110418)
MC ALLISTER, Jesse J., Sr. v. Department of the Army (AT07528110377)
MC GHEE, Gloria J. v. Health and Human Services, Social Security Administration (AT07528110274)

MEAD, William P. v. General Services Administration (SF07528110182)
 MEDINA, Efrain v. Department of the Air Force (DA07528110528)
 MIKUCKI, Mark C. v. U.S. Postal Service (CH07528110072)
 MOORE, Jack L. v. Department of the Treasury (AT07528110308)
 MORIN, Anthony v. Department of Transportation, Federal Aviation Administration (SE07528110198)
 MOSES, Elmer v. Office of Personnel Management (SF831L8110444)
 NIVERT, Margery Aymami v. Office of Personnel Management and Teresa E. Nivert, Intervenor (DA08318010311)
 OLIVA, Julian C. v. Office of Personnel Management (SF083109001)
 PARKER, William W. v. Department of the Navy (DC07528110856)
 PATTON, Gary N. v. Department of Health and Human Services (AT531D8110775)
 PREVITE, Anthony F. v. Small Business Administration (BN07528010067)
 PURIFOY, McElree v. Office of Personnel Management (SF831L8010036)
 REYNOLDS, Barbara L. v. Department of Labor (SF07528110279)
 ROSANO, Lawrence R. v. U.S. Marine Corps (SF315H8010134)
 RUDNICK, Stuart v. General Services Administration (PH07528110267)
 RUSSELL, Clifton A. v. Equal Employment Opportunity Commission (DC07528110219)
 SIMMONS, Willis O. v. Department of the Navy (SF07528010271)
 SMITH, Joseph M. v. Department of the Interior (DA03518110567)
 SMITH, Sophia v. Office of Personnel Management (SF831L8110637)
 TALBOTT, Lewis B. v. Veterans Administration (CH07528110121)
 TUGANO, Benito v. Department of the Navy (SF07528110948)
 WEST, Charles E. v. Department of the Navy (PH07528110285)
 WILSON, David L. v. U.S. Postal Service (DC07528110624)
 ZULAICA, Rebecca v. Department of the Air Force (DA03518110574)

PETITIONS FOR REVIEW DISMISSED

COOPER, Jeffrey v. Department of the Treasury (PH075209068)
 GOEKE, Paul J. v. Office of Personnel Management (DA08318110307)
 MORRIS, David V. and Hendricks, Silas v. Department of the Interior (HQ71218210007)

MORTENSEN, William B. v. Office of Personnel Management (DE831L8110120)

PETITIONS FOR REVIEW GRANTED

CREEK, Catherine v. Smithsonian Institution (DC531D8110041)
 GULKA, Steven P. v. Office of Personnel Management (DC300A8010414)
 RITCHEY, John W. v. U.S. Postal Service (PH07528010154)

AGENCY PETITION FOR REVIEW GRANTED

BARGER, Kenneth v. Department of Justice (SE075209019)

INITIAL DECISIONS AFFIRMED

AMAT, Antonio v. Department of the Navy (SF07528110497)
 CHAPMAN, Katherine C. v. Office of Personnel Management (AT831L8110284)
 CHRISTENSEN, Eva L. v. Department of Health and Human Services (DC03518110170)
 DANESE, Samuel S. v. Internal Revenue Service (DA07528090242)
 GAGE, John B. v. Department of the Air Force (DA075209093)
 JOHNSON, Alejandro M. v. Department of the Air Force (DA07528110347)
 JONES, William D. v. Farm Credit Administration (SL075209015)
 KOMAREK, Linda v. Office of Personnel Management (CH831L8110246)
 PITZAK, William v. Office of Personnel Management (DE831L8110062)
 RICHARDSON, Emery v. Department of Justice (SF07528110018)
 SMITH, Osborne C. v. Department of the Navy (PH07528010269)
 SPIGNER, Leroy v. Department of the Navy (SF075209072)
 TUCKER, Maxine J. v. Veterans Administration (PH07528110322)

INITIAL DECISIONS BECAME FINAL DECISIONS OF THE BOARD

BISHOP, Carol J. v. Office of Personnel Management (DE831L8110187)
 TURNER, Theodore A. v. Office of Personnel Management (DC831L8110878)

INITIAL DECISIONS REVERSED

AUSTIN, William E. v. Department of Justice, Drug Enforcement Administration (SF07528110235)
 BANKS, Charlotte A. v. Department of the Treasury, Internal Revenue Service (SL07528110079)
 BLOW, Morgan R. v. Department of the Navy (PH07528010150)

DAMSTROM, Herbert H. v. U.S. Postal Service (SL07528110099)
FRISBY, Clorisse E. v. Department of the Treasury, Internal Revenue Service (PH04328010423)
KRAUTHAMER, Jules v. Department of Agriculture (NY07529090123)
YORK, Leon A. v. U.S. Postal Service (PH075209159)

INITIAL DECISION VACATED

JOYNER, Edith v. Department of the Navy (PH075209050)

REMANDED TO REGIONAL OFFICES

BONET, Dimas, Appellant v. U.S. Postal Service, Respondent (DA075209125)
HATCHER, Willie E. v. Department of the Army (AT07528110266)
JUSTICE, Marilee M. v. Department of the Army (PH075209109)
LELAK, George v. Department of Health and Human Services (CH07528110184)

APPEAL REOPENED BY THE BOARD

KETCHEM, John C. v. Department of Transportation, Federal Aviation Administration (DA075281F10713)

AGENCY REQUEST FOR STAY DENIED

ROBERTS, Delmont C. v. Department of the Treasury (NY075299043)

PETITIONER'S MOTION TO WITHDRAW PETITION FOR REVIEW GRANTED

LENDT, Lee A. v. Government of the District of Columbia (DC03518110339)

REQUEST TO REVIEW INTERLOCUTORY RULING DENIED

HOWARD, Dorothy v. Department of the Air Force (SF07527600003)

MOTION TO VACATE ORDER DENIED

PADILLA, Sandy v. Equal Employment Opportunity Commission (SF07528110845)

BOARD CONSOLIDATED PROCEEDINGS

FORMER COMMUNITY SERVICES ADMINISTRATION EMPLOYEES, Appellants, v. Department of Health and Human Services, Respondent (HQ12008110063) [Consolidated Proceedings]

CASES ASSIGNED TO ADMINISTRATIVE LAW JUDGES

In the matter of Jerry G. Brennan ALJ, Social Security Administration, Department of Health and Human Services (HQ75218210010)
In the matter of Donald S. Manion ALJ, Social Security

Administration, Department of Health and Human Services (HQ75218210008)
In the matter of Mary J. Arterberry, ALJ, Social Security Administration, Department of Health and Human Services (HQ75218210009)
DE MONNIN-METCALF, Charlyne Y. v. Department of Health and Human Services (SE07528210054)
BURRIS, Susan Karen v. Department of Health and Human Services (SE07528210049)
MYERS, Edward Oscar v. Department of Housing and Urban Development (SE07528210062)
WHITMORE, Dale Leroy v. General Services Administration (SE315H8210067)
USHER, Benjamin G., Appellant v. Occupational Safety and Health Review Commission, Respondent (NY03518210297)

CASES UNDER THE SPECIAL COUNSEL

SPECIAL COUNSEL v. Department of Housing and Urban Development (HQ12088210001)
SPECIAL COUNSEL v. Department of Housing and Urban Development (HQ12088210004)
SPECIAL COUNSEL v. George H. Farrow, Sr. (HQ120600035)
SPECIAL COUNSEL v. Berton E. Owens (HQ120600033)
SPECIAL COUNSEL v. Robert H. Smith, Jr. (HQ120600034)

REQUESTS FOR EXTENSIONS OF TIME GRANTED

ALMON, Winston C. v. National Aeronautics and Space Administration, George Marshall Space Flight Center (AT07528111048)
CAMBI, David v. Department of Energy (NY07528210022)
CARTER, William J. v. Department of the Interior (DA03518210134)
CHAMBERLAIN, Theodore K. v. Veterans Administration (DC07528090237ADD)
COLEMAN, Garrett V. v. Department of Education (DC03518210334)
DUNCAN, Lonnie v. Department of Education (DA07528110642)
GLOVER, Betty Jean v. Department of Health and Human Services (DC07528210352)
GODBEY, John O. v. U.S. Postal Service (PH07528210011)
HALL, Bert E., Jr. v. General Services Administration (PH07528210099)
HEADLEY, Frederico J. v. Smithsonian Institution (DC07528110358)
HOLMES, Gregg E. v. Department of Transportation, Federal Aviation Administration (DA075282F0024)
KELLER, Billy B. v. National Aeronautics and Space Administration, George Marshall Space Flight Center (AT07528111208)

KENNEDY, Robert v. Office of Personnel Management (DC831L8210392)

KUNTZ, Katherine H. v. National Aeronautics and Space Administration, George Marshall Space Flight Center (AT07528111217)

LAWS, Louise v. Department of Defense (CH07528210098)

MARTIN, James R. v. National Aeronautics and Space Administration, George Marshall Space Flight Center (AT07528111202)

MILLAN, Hilario v. Office of Personnel Management (SF08318110904)

NEIGHBORS, Billy H. v. National Aeronautics and Space Administration, George Marshall Space Flight Center (AT07528111225)

PRICE, Patricia D. v. U.S. Army, U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee (AT07528110660)

STROMFELD, Stuart v. Drug Enforcement Administration (NY07528110336)

TOLENTINO, Bartolome G. v. U.S. Postal Service (SF07528210008)

TRIPLETT, James L. v. Defense Logistics Agency (AT07528110871)

WILLIAMS, James W., Jr. v. General Services Administration (DE07528210040)

YGLECIAS, Martha J. v. Office of Personnel Management (SF831L8110253)

YODER, Gilbert A. v. Department of the Air Force (DC07528090063ADD)

REQUESTS FOR EXTENSIONS OF TIME DENIED

GOTTLIEB, Morris v. Office of Personnel Management (NY08318210189)

KETCHEM, John C. v. Department of Transportation, Federal Aviation Administration (DA075281F0713)

SKAGGS, Clinton v. Social Security Administration (M-80-8)

ERRATA

AMATO, Thomas v. Department of the Treasury (NY07528210257)

BLOW, Morgan R. v. Department of the Navy (PH07528010150)

FARWELL, Richard H. v. U.S. Postal Service (AT07528110501)

HELLMAN, Donald L. v. Office of Personnel Management (AT360A7990002)

STECHLER, Bernard v. Department of Energy (NY03518210062)

MAY CASES

ADVERSE ACTIONS

LEON ALLEN, et. al. v. DEPARTMENT OF THE ARMY (Docket No. PH07528010126)

May 26, 1982

1.110; 1.120; 1.343; 1.345; 1.371; 1.400; 1.410; 10.114; 14.700

The agency petitioned the Board to review the initial decision which sustained charges against the appellants, but reduced the penalty from removal to a 30-day suspension.

Appellants, according to the undisputed record, falsified travel vouchers. The presiding official reduced the penalty mainly because he concluded that the agency had violated the principle of like penalties for like offenses. Among the agency's contentions in its petition was that this principle was not violated because appellants' actions were "infinitely different" from instances relied on by the presiding official for comparison.

The removal notice stated that appellant Allen had been authorized temporary duty in another location for 26 days beginning January 14. He signed a travel voucher claiming \$398.41 reimbursement for lodging when the actual amount was \$122. According to the voucher, he left to return to his duty station on February 1. He did not report for work until February 8. Consequently, he was carried as AWOL for this period of time. On reporting to work on February 8, he said that he had left for his duty station that day. He was charged with knowing falsification of travel vouchers. Two other similar cases were consolidated with this case on appeal.

From the record, the Board said it could not conclude that any of the parties were claiming lodging expenses up to February 8. Rather, they had completed their temporary duty early, but did not report back to their duty stations until the authorized 26 days had elapsed. The Board said that the agency could properly rely on the AWOL, misuse of government vehicle, and falsification of travel documents charges in deciding on proper sanctions.

The Board held in *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981), that it has the authority to review penalties imposed by the agencies, and to modify penalties it finds to be unreasonable.

The Board has ruled—*Bivens v. Tennessee Valley Authority*, MSPB Order No. AT075219003, (April 14, 1982)—that where the appellant shows that disparate treatment in the imposition of penalties has occurred, the agency will be upheld only if it can prove by a preponderance of the evidence a legitimate reason for the difference in treatment. In this case, the agency said the difference between this and earlier cases was that prior employees had knowingly falsified time and attendance reports, while these appellants had turned in false travel vouchers, were AWOL and misused a government vehicle. However, the Board said that the crux of all these charges was the same, namely, falsification. Also, other employees disciplined were in positions of trust and authority, while these appellants were not. The individuals in the other cases were merely suspended and demoted, not removed.

The Board said that the maximum reasonable penalty for these first offenses was demotion. Accordingly, it affirmed the initial decision as modified by this opinion and order, and ordered the agency to cancel the removals and substitute demotions to the next lowest grade.

JERRY DEAL v. DEPARTMENT OF JUSTICE (Docket No. SL07528010006)

May 10, 1982

1.361; 1.369; 1.400; 1.410; 1.430

Charged with two counts of violating agency regulations concerning outside employment, appellant was removed as Supply Technician at the U.S. Penitentiary in Leavenworth.

The presiding official sustained the first charge of failure to get prior approval of outside employment. As to the second, although appellant's business dealings with his employer did constitute a prohibited conflict of interest, the presiding official found that appellant proved he was treated differently from other employees who were also doing business with the penitentiary. Since disparate treatment is a prohibited personnel practice, the presiding official reversed the second charge, and mitigated the removal of a 30-day suspension based on the one sustained charge.

The Board granted the agency's petition for review.

Appellant, a receiving clerk at the prison commissary warehouse, in partnership with the commissary

supervisor set up a catalog company to sell gift items to inmates, and another company—Midwest Wholesale Company—through which the supervisor bought goods to be sold in the commissary. Appellant did not dispute charges that his business relationship was a conflict of interest in that the partnership was selling goods to appellant's employer and, further, that the buyer was his business partner, but alleged that other employees were doing business with the penitentiary and were not disciplined.

According to the record, other employees sold goods to inmates, but they did not benefit from their government jobs in doing so. In this case, however, the Board found that appellant's partnership in Midwest had, as its central purpose, a function so closely related to the duties of his Federal employment that it constituted a prohibited conflict of interest. The Board found that the agency established that other employees who were not disciplined were not in similar situations. Therefore, the Board found that appellant's claim of disparate treatment was lacking in merit.

The Board then looked at the issue of the correctness of the penalty for the two sustained charges. In *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981), the Board said it had the authority to mitigate penalties, but it said it did not have the authority to simply substitute its judgment for management's. It found appellant's wrongdoing was a serious breach of trust. Although appellant had almost 17 years service with the penitentiary with no prior disciplinary record, in light of the Government's compelling interest in avoiding conflicts on the part of its employees, and in upholding the integrity of the Federal service, the Board found that removal was not too harsh a penalty. The initial decision was reversed and the removal action sustained.

JERRY A. GILLEY v. DEPARTMENT OF JUSTICE
(Docket No. AT075209155)
May 5, 1982

1.130; 1.367; 1.369; 1.400; 1.410; 10.1322; 14.700

Appellant, a Supervisory Correctional Officer, was reduced in grade from GS-11 to GS-8 and reassigned to another state. The charges were using excessive force against an inmate and failing to preserve evidence. They stemmed from an incident during which appellant went to the assistance of a fellow officer who was trying to subdue an inmate.

In the initial decision, the presiding official found that the agency proved part of the first charge, that is,

that appellant had punched the inmate, but that it did not prove he used excessive force. The presiding official also found that the agency had proven the second charge except that he found no evidence that this failure to preserve evidence created a problem in prosecuting the inmate for assaulting the correctional officer. The presiding official reversed the reduction in grade action, finding it too harsh for the single proven charge, but did not decide the issue of reassignment, saying it was not appealable to the Board, and that the agency had not, in fact, transferred appellant.

Both appellant and the agency filed petitions for review.

In considering the agency's petition for review, the Board found no reason to reverse the initial decision, but granted the petition because it wanted to consider the correctness of the penalty the agency had specified.

The Board denied appellant's petition for review. Regarding the proven charge, failure to preserve evidence, the Board found that this charge was supported by a preponderance of the evidence.

As to the penalty, the Board pointed to *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981) where it said it would review an agency-imposed penalty to determine whether it was clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious or unreasonable. Noting that a penalty should be selected only after the relevant factors (including proper management responsibility) have been weighed, the Board held that its review would be to assure that the agency conscientiously considered the relevant factors and chose a reasonable penalty.

In this case, the Board said that the most relevant factors were the seriousness of the offense and appellant's disciplinary and work records. It said that whenever an agency's action is based on multiple charges, some of which are not sustained, the Board will carefully consider whether the sustained charges merited the penalty the agency imposed.

Appellant's failures, such as not taking photographs of the scene, did not preclude the prosecution of the inmate for assaulting the correctional officer. Further, the record showed that appellant's work record was satisfactory.

The Board said that although appellant's failure to preserve the evidence was a clear violation of his duty, a 30-day suspension was the maximum reasonable penalty.

Since it found the reduction in grade unreasonable, the Board invalidated the proposed reassignment at the lower grade. The Board affirmed the initial decision as modified, cancelled the reduction in grade, and put a 30-day suspension in its place.

JEFFREY KUFEL v. U.S. POSTAL SERVICE (Docket No. CH07528110245)
May 26, 1982

1.110; 1.311; 1.369; 1.371; 1.400; 1.420; 1.600; 3.130; 3.131; 3.1321

The presiding official sustained appellant's removal based on his being AWOL from November 11 through 29, 1980. Appellant petitioned the U.S. Court of Claims for review. The Board requested and obtained remand.

Appellant is a disabled Vietnam veteran. During employment with the Postal Service—about 18 months—he was absent about 73 percent of the time; at least two absences were without leave (AWOL). In a Letter of Intent dated November 19, 1980, appellant's supervisor notified him that he would be charged as AWOL starting November 11 if he did not acceptably justify such absences within five days from receipt of the letter. Appellant's response letter of November 22 stated he had a lung infection, and included medical documents and a letter previously sent his supervisor. He said he had been told he need not call his duty station daily because he was being placed on leave until further notice. He indicated that he planned to return to work on November 23, and asked that he be immediately advised whether this response was sufficient. He received no response, and on November 29, a notice of proposed removal was issued, listing as reasons (1) failure to report for duty since November 11, and (2) failure to give a satisfactory reply to the Letter of Intent.

On December 16, appellant replied to the notice referring to earlier letters, and attaching medical statements and reports. On December 24, the agency removed appellant, stating that the first charge was fully supported, and making no mention of the second charge.

On the subsequent appeal, the presiding official found that the agency had supported the first charge by a preponderance of the evidence, and that appellant did not demonstrate that he met the definition of a handicapped employee, as he had contended as his affirmative defense.

The presiding official found that appellant's November 19 letter did not adequately document his absence from work, and that appellant was in fact AWOL. However, the Board said this reasoning disregarded the fact that the agency did not rely on the second charge—failure to respond adequately to the Letter of Intent—in its removal decision. Therefore, the Board said that it must conclude that appellant's response to the letter satisfactorily justified his absence from duty, and appellant should not be considered AWOL.

The agency's argument, which the presiding official sustained, was that the removal was because of appellant's absenteeism. However, the Board found that it did not rely on the attendance or performance requirements, but on a specific AWOL charge which was not supported by a preponderance of the evidence. Therefore, the removal action could not be sustained. (*See Johnston v. Government Printing Office*, MSPB Order No. DC075209003, (April 15, 1981)).

Addressing appellant's contention that the agency discriminated against him because of his physical handicap, the Board said that the record was insufficient to support a claim of physical impairment or illness as contemplated by 29 C.F.R. 1613.702(b)(1). Since appellant had worked for the Postal Service for about 18 months before showing signs of respiratory distress, and had failed to prove he was handicapped within the meaning of the regulation, i.e. That his lung condition substantially limited a major life activity, the Board found no evidence sufficient to invoke the Rehabilitation Act of 1973 and its implementing regulations.

Since the agency failed to prove its charges by a preponderance, the Board reversed the initial decision, and ordered cancellation of the removal action.

HARRY LUNDY v. DEPARTMENT OF THE NAVY (Docket No. PH07528110250)
May 13, 1982

1.110; 1.120; 1.320; 1.400; 1.410; 1.420; 3.1313; 3.1321; 3.1322; 3.133; 11.133; 14.700

Both the appellant and the agency filed petitions for review of the initial decision which reduced appellant's removal to a 60-day suspension.

The agency on September 4, 1980 in a meeting with appellant, his union representative and an agency official, informed appellant that it was thinking of removing him. Appellant had requested leave to be with

his daughter for surgery on July 22, but the surgery in fact took place on July 24. A note from a nurse had been altered to the July 22 date. Appellant was at work on the date his daughter was actually hospitalized.

Appellant said the conduct was tied to an alcohol problem which the agency knew about. On agency recommendation, appellant entered an alcohol treatment center. He was placed on a combination of sick leave, annual leave, and leave without pay.

When appellant returned to work on October 14, the agency gave him a notice of proposed removal for the July 22 incident; also considered was appellant's past disciplinary record. He was removed on January 9, 1981.

In his appeal to the Regional Office, appellant claimed that the removal was contrary to the agency's own regulations regarding alcohol-related problems in its employees. Although the presiding official found the charges sustained, and that the agency had met its requirements on treating employees with alcohol-related problems, he found removal too harsh a penalty.

Both appellant and the agency filed petitions for review.

Appellant claimed the presiding official had erred, that the agency action was a prohibited personnel practice, while the agency asserted it had met the correct burden of proof, and that the presiding official was wrong in lessening the penalty.

Granting both petitions, the Board pointed to its holding in *Ruzek v. General Services Administration*, MSPB Order No. SL075209017 (August 20, 1981) that alcoholism is a handicapping condition under the Rehabilitation Act of 1973 as it relates to Federal employment. Thus, the agency must provide reasonable accommodation for the handicap, unless doing that would put undue hardship on its program. In *Ruzek* it said that "an agency must offer the employee rehabilitative assistance and allow him an opportunity to take sick leave for treatment, if necessary, before initiating any disciplinary action for continuing performance or misconduct problems related to his alcoholism."

In this case, the Board found that appellant qualified as handicapped. Although the agency denied knowledge of appellant's problem before the September 4 meeting, the Board noted that at that point, the appellant had informed them that his conduct was alcohol-related. Moreover, the Board found that implicit in the agency's granting three types of leave to appellant was the willingness to give appellant

a "reasonable opportunity for rehabilitation." See *Felten v. Department of Labor*, MSPB Order No. CH07528010005 (August 26, 1981).

The Board decided that the agency had arbitrarily withdrawn its reasonable accommodation and thus committed the prohibited personnel practice of handicap discrimination. It reversed the initial decision and ordered the agency to cancel the removal.

JAMES E. MILLER v. DEPARTMENT OF THE NAVY
(Docket No. BN075209065)
May 17, 1982

1.130; 1.369; 1.430; 4.120; 10.122

Appellant was downgraded from a supervisory GS-11 to a non-supervisory GS-9 because of failure to properly charge the absences of two subordinates to leave. He alleged that he was unaware of their absences and had not purposely misreported their hours on the time cards. The presiding official sustained the agency action, finding in one case that while appellant may not have known of the absences, through the exercise of reasonable supervision, he should have known. In the other case, the employee had submitted leave requests, but appellant had not properly charged the leave.

In his petition for review, appellant alleged that the presiding official was biased, said that the testimony of agency witnesses was coerced, argued that he was treated disparately, and alleged he was presenting newly discovered evidence.

Regarding the allegation of bias, the Board said appellant had offered no evidence. He also failed to substantiate his allegation that the testimony given by the other agency employees involved in the case was so "tainted" as to be not believed. As to his allegation that the penalty meted out to him was disproportionate in comparison to that given the other employees, the Board agreed with the presiding official that the difference in penalties was explained by the fact that the appellant was the supervisor.

As alleged new evidence, appellant introduced a memo which stressed employees' responsibility to report leave accurately. He characterized this memo as reflecting a lack of uniformity in reporting leave during the relevant time frame of this appeal. However, the Board said that the supervisor is accountable for monitoring the activities of subordinates. It agreed with the presiding official that appellant should have

known of his subordinates' acts and taken action accordingly. The petition for review was denied.

GENE THOMPSON v. SMITHSONIAN INSTITUTION

(Docket No. DC07528010104)

May 11, 1982

1.110; 1.366; 1.390; 1.400; 1.410; 1.420; 4.210

Appellant's agency removed him because of his "inability to perform work commensurate" with his position, and his uncooperative behavior on the job. Appellant asserted racial discrimination. The presiding official sustained the agency's action and dismissed the allegation of racial discrimination, finding that the appellant did not establish a prima facie case.

In his petition for review, appellant contended that the presiding official was wrong in applying the preponderance of evidence standard to only the incidents cited by the agency and not to the overall charges of failure to perform work commensurate with the position and of uncooperative behavior. He argued that even if the presiding official had applied the evidentiary standard to the charges, she did not determine whether removal was the appropriate penalty in this case. The Board granted the petition.

The Board said that when an agency takes an action under Chapter 75, that action will be sustained only if supported by a preponderance of the evidence, and that this applies to the agency's burden in proving the "cause" which led to the disciplinary action. It also applies to factual considerations the agency relied on in selecting a penalty.

In this case, the presiding official found that appellant had on one occasion impeded a project because he was slow, argued with the Electrician Leader, did not follow instructions, and that appellant was removed from a project to prevent delays after his co-workers complained about him. In his petition for review, appellant contended that these incidents did not establish by a preponderance of the evidence that he was unable to perform work commensurate with his position and that he was uncooperative. However, the Board found that a preponderance of the evidence supported both charges.

The Board then discussed the agency-imposed penalty. Using guidelines it laid down in *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981), and in *Snipes v. U.S. Postal Service*, MSPB Order No. AT075209206 (May 1, 1981), the Board considered the relevant factors in this case,

and decided the presiding official did not err in affirming the removal. It found the penalty of removal reasonable.

ACCEPTABLE LEVEL OF COMPETENCE

WILMA N. DAY v. U.S. DEPARTMENT OF AGRICULTURE (Docket No. AT531D8110300)

May 14, 1982

4.300; 4.310; 9.110; 9.313; 9.320; 9.324

The presiding official reversed the agency's negative acceptable level of competence decision, finding that it was unlawfully based partly on allegations of misconduct. He also found the agency committed harmful error by not providing certain documents to the appellant until she made her oral presentation at the reconsideration hearing.

The agency filed a timely petition for review contending that the presiding official erred in finding harmful error because it had provided the requested material to appellant prior to her oral presentation.

The Board found that failing to provide appellant with documents contained in the reconsideration file until the time of oral presentation violated 5 C.F.R. §531.407(d)(4), and constituted harmful error. The Board further found that the record showed that the appellant did not actually receive the documents in question until the date of the oral presentation. The record also showed that the agency relied extensively on these documents in denying appellant's within-grade increase.

The Board also found that in denying appellant's within-grade increase, the agency relied on allegations of misconduct and unacceptable performance outside the period being considered.

The Board affirmed the initial decision, as modified, and ordered the agency to grant appellant's within-grade increase retroactive to the date of initial eligibility.

WERNER R. MATTERS DORF v. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Docket Nos.

DC531D8110227 and DC531D8110430)

May 12, 1982

4.300; 9.110; 9.2141; 9.2144; 9.324; 9.331

The agency petitioned for review of two initial decisions which reversed its denial of a within-grade salary increase to appellant, a GS-13 Systems Analyst. In the first initial decision, the presiding official ruled that the Food and Drug Administration committed harmful error when it did not consider appellant's performance during all of the three-year waiting period—specifically a period of approximately two years when appellant was on detail to the Environmental Protection Agency.

In the second decision, the presiding official also found harmful error. The agency halved appellant's additional 60-day redetermination period by failing to consider his performance while on another detail to EPA for about one month of that period. The Board granted both agency petitions and consolidated them for review.

On May 21, 1980, 52 days before appellant would have been eligible for a within-grade salary increase, his supervisor notified him that his performance was not at an acceptable level of competence and that she would not so certify that it was for purposes of a within-grade increase unless it improved. In a July 11, 1980 memo, appellant was denied his step increase. He appealed the agency's subsequent reconsideration decision. Since he was notified 52 days rather than the required 60 days before the end of the three-year consideration period, he was given 60 more days to improve his work. At the end of that period, appellant's supervisor issued a second negative determination. Subsequently, the agency issued a second reconsideration decision, which appellant appealed.

The Board agreed with the agency's contention that the presiding official unduly restricted the scope of his review of the agency action. In *Parker v. Defense Logistics Agency*, 1 MSPB 489, the Board concluded that the presiding official's review is not limited to the reconsideration record.

Regarding the first initial decision, the Board noted that because the quality and amount of work appellant performed while on detail were not those required of a GS-13, the EPA could not evaluate his performance according to standards normal for that grade level.

As to the second initial decision, the Board said that the presiding official relied too much on the agency's advance notice and reconsideration decision, and failed to consider other relevant evidence and testimony. Using the substantial evidence standard it laid down in *Parker*, the Board found that the agency used that standard in considering appellant's performance during the entire waiting period, and that it had not committed harmful error.

The Board also found substantial testimonial evidence to show that appellant was not working at an acceptable level of competence at FDA and that the agency, relied heavily on evidence of appellant's unsatisfactory performance during the latter stages of his waiting period. The Board has repeatedly held that such latter stage performance is extremely significant and may be given the greatest emphasis in ALOC determinations.

Although the 60-day redetermination period was shortened because appellant was at EPA for half that time, appellant did not show that it would have made any difference if he had spent full time at his agency. According to testimony, he produced nothing of substance during his four weeks at FDA.

The initial decisions were reversed and the agency's denial of the within-grade increase in salary was sustained.

AIR TRAFFIC CONTROLLERS

JOHN C. KETCHEM v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION (Docket No. DA075281F0713)
(May 28, 1982)

1.110; 1.311; 1.600; 4.000000; 4.124; 4.127; 4.130; 4.131; 4.210; 4.320; 6.900; 7.327; 10.112; 10.120; 10.130; 10.131; 10.410

Based on charges that he took part in an illegal strike from August 9 to August 11, 1981 and was AWOL for that period, appellant was removed as an Air Traffic Control Specialist, effective August 30, 1981. The presiding official sustained the removal.

On April 1, 1982, the Board reopened the appeal to consider 10 issues which were common to most of the approximately 10,900 ATC removal appeals before the Board, and requested briefs from interested parties. It received and considered some 32 *amicus* briefs, as well as the agency's brief which was joined by the Office of Personnel Management and the Department of Justice.

In the initial decision, the presiding official took official notice that a strike by thousands of controllers occurred from August 3 through August 11, 1981. He found that circumstantial evidence clearly showed that appellant took part in the strike and was AWOL on the dates charged, and that the agency had proven its charges by a preponderance of the evidence.

In its reopening order, the Board listed two threshold issues: whether an unlawful strike took place in August of 1981, and whether the presiding official properly took official notice of that fact. It noted that the Board's regulations provide that a presiding official "may take official notice of matters of common knowledge or matters that can be verified." Additionally, it noted that the specific regulation does not explicitly provide for the parties to have the chance to contradict whatever has been officially noticed, but that such right is implicit.

The Board found that a strike by the controllers began on August 3, 1981, and that this is a matter of common knowledge which may be officially noticed under the Board's regulation. It said that the presiding official correctly found that an unlawful strike of Air Traffic Controllers started on August 3. It did not, however, support his finding that the strike was in progress through August 11, since the Board concluded whether the strike continued beyond August 6 is subject to substantial dispute. For example, one Federal district court judge has ruled that the strike ended on August 6, a holding similar to that of other Federal District courts. The Federal Government has stated that the strike ended on August 8. Because of this conflicting information, the Board said it could not conclude that it is a matter of common knowledge that the strike was still in progress on August 9 through August 11, and therefore it could not take official notice of such fact. It did take official notice, however, (subject to the right of refutation) that an unlawful strike of controllers started on August 3 and was in progress on August 6. Therefore, where an employee like the appellant is charged with taking part in a strike after August 6, the agency bears the burden of proving that a strike was actually in progress on the date charged, and that the employee could have returned to work on that date.

The Board concluded that an unlawful strike of traffic controllers took place from August 3 through August 6, 1981, and that the presiding official was wrong in taking official notice that the strike continued through August 11. Because the question of whether the strike was in progress during the dates charged by the agency is fundamental to the agency's action against the appellant, as well as against other similarly situated appellants, the Board vacated the initial decision, and remanded the appeal to the Regional Office. It did not consider the remaining issues listed in its reopening order at this stage of the proceedings.

ANNUITIES

LEVERETT EDWARDS v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. DA08318010182)

May 24, 1982

6.100; 10.100; 10.130; 15.120; 15.200; 15.400; 15.410

Appellant petitioned for review of the initial decision which sustained the Office of Personnel Management's reconsideration decision denying his eligibility for either a supplemental annuity benefit or redetermination of his original annuity benefit. Appellant based his claim on service performed from 1970 to 1979 as an arbitrator for the National Mediation Board after his optional retirement from that agency. While OPM called this service intermittent and said it did not provide entitlement to annuity, appellant contended he had served full time with a pre-scheduled tour of duty.

Noting that the statute does not provide for an increased annuity where the annuitant has been reemployed as an intermittent employee, the presiding official found that during the relevant period appellant was an intermittent employee, and concluded that he was not entitled to an increase in his annuity.

In his petition for review appellant claimed that the presiding official erred in relying on OPM's regulations which were not—in light of the controlling statute and the evidence—applicable in his case. He argued that, should his arguments not be accepted, he should get a refund of the \$90,667.08 withheld from his pay and deposited to the Retirement Fund. OPM disclaimed jurisdiction over appellant's claim for a refund, saying this was a question of whether appellant received the correct amount of pay which is a matter for the Comptroller General. The Board held that it lacked jurisdiction to consider the question of a refund absent an OPM decision on the matter.

In analyzing appellant's claim that the presiding official erred in finding appellant to be an intermittent employee, the Board found that appellant probably worked about 95 percent of the potential work days each month. It noted that in *Dove v. United States*, 161 Ct. Cl. 768 (1963), the court held, in effect, that a "when actually employed" (WAE) employee who works 90 to 98.4 percent of the available work days over an extended period of time is "in all respects, save the paper record, a full-time, per annum employee."

The Board found that appellant was similarly, in all respects but the paper record, a full-time employee during the period at issue. Therefore, it ruled that he was entitled to annuity benefits. It reversed the initial decision and ordered OPM to let appellant choose

either an increased annuity or redetermination of his annuity.

ATTORNEY FEES

In the matter of the Honorable Drew Lewis, Secretary, Department of Transportation, et al* (Docket No. OJ-80-7)
May 17, 1982

3.131; 6.111; 14.110; 14.500; 14.530; 14.540; 14.600;
16.000000; 16.230

Petitioner, an employee of the Federal Aviation Administration, petitioned for attorney fees in connection with an action on his behalf by the Special Counsel. At the Special Counsel's request, the Board had stayed the proposed removal of petitioner who had refused to accept a geographical reassignment. The Special Counsel alleged that the reassignment was motivated by discrimination on the basis of a handicapping condition. The agency and appellant negotiated a settlement through which appellant was neither reassigned nor removed.

The Board said it lacked the authority to award attorney fees in this kind of case. It said that petitioner was not a party to the action through which the Special Counsel obtained a stay, so the provision (5 U.S.C. §7701(g)) which authorizes the Board to order payment of attorney fees to an employee or applicant who is a prevailing party did not apply here.

Further, the Board said it could not authorize payment under the Back Pay Act, 5 U.S.C. §5596(b)(1)(A)(ii). Payment can be ordered only if an "appropriate authority" has determined that the petitioner has been subjected to an unjustified personnel action which resulted in loss of pay. Although the Board is an "appropriate authority," it had not made the required determination. The employing agency, not the Board, corrected the challenged personnel action in this case. The Board simply provided interim relief. The issuance of such a stay is not a final decision on the merits of the case. The Board denied the motion for attorney fees.

*Case was formerly captioned *In the matter of Neil R. Goldschmidt, et al.*

DISABILITY RETIREMENT

MARY JANE DALEY v. OFFICE OF PERSONNEL MANAGEMENT and DEPARTMENT OF HEALTH AND HUMAN SERVICES (CSA 2 241 438) (Docket No. PH831L09005)
May 25, 1982

1.111; 6.120; 6.400; 15.130; 15.132; 15.13212; 15.133

The Office of Personnel Management originally granted the disability retirement application filed by appellant's agency. Then, OPM affirmed its grant, and appellant appealed that reconsideration decision to the Board's Philadelphia Office. The presiding office sustained OPM's decision to grant disability retirement, whereupon appellant petitioned the Board for review, saying that she had new evidence in support of her claim that she was not totally disabled for service in the position she last occupied.

The Board said that while appellant's evidence (a letter from a doctor saying she was capable of employment, but making no statement on appellant's mental condition) was new, it was not material to her appeal. However, the Board reopened the case on its own motion, since it presented issues regarding the deciding roles and burdens of various parties, such as the employee, the agency and OPM, in appeals from agency-initiated disability retirement applications.

The Board noted that the presiding official had put the burden of proof alternately on the appellant and on OPM, but that in *Chavez v. Office of Personnel Management*, MSPB Order No. DA831L09003, (May 28, 1981), it had held that the employee has the burden to prove disability on a voluntarily-initiated application. In *Chavez*, the Board noted that Congress' intent was to place the burden on the party initiating the action. Therefore, it considered the question of who initiated the action in this case.

Where an agency starts the action, the employee make take part in such a process, and must be kept informed, but the agency may carry it out without the employee's involvement. The employee may ask for a reconsideration decision, once OPM has issued its decision, and thereby becomes another party to the action already underway.

In this case, the Board said that the presiding official should have viewed the employing agency as the initiator of the action, and given it the burdens associated with that role. The Board affirmed the presiding official's factual findings, and found that the employing agency had met its burden to prove the appellant was totally disabled. The initial decision was affirmed as modified by this Opinion and Order.

OTHER MAY ISSUANCES

PETITIONS FOR REVIEW DENIED

ALFORD, Rayford, Jr. v. Department of the Navy
(AT752S8110365)

ANDERSON, Florence J. v. Veterans Administration
(DE07528110115)

BANDY, Janet A. v. U.S. Department of Housing and
Urban Development (DC3448210032)

BARRERA, Lesbia v. Department of the Army
(DC315H8110626)

BERNABE, Tomas P. v. Office of Personnel Manage-
ment (SF08318110821)

BLANCHARD, William H. v. Department of the Navy
(PH07528010116ADD)

BOWERS, Oscar L. v. United States Postal Service
(AT075209258)

BRITTAIN, Clay V. v. Department of the Army
(PH035109034)

BUNCE, Howard v. General Services Administration
(SF07528111888)

CALDWELL, Eric v. Department of Justice
(AT752S8110963)

CARTER, Harry C. v. Department of the Army
(AT07528110203)

CLOWERS, Debra v. U.S. Postal Service
(CH07528210063)

DAMA, Joseph D. v. Department of Health and Hu-
man Services (NY531D8110028)

DARRACH, John B. v. Department of the Army
(PH07528110088)

DAVIS, Sandra H. v. United States Department of
Agriculture (AT03518010188)

DEMCHAK, John M. v. Department of the Interior
(DE03518110310)

DIGGS, Calvin H. v. Office of Personnel Manage-
ment (DC831L8110635)

DONALD, Wayne S. v. Department of Education
(AT34438110637)

DONOVAN, William v. Federal Aviation Administra-
tion (AT075282F0089)

DOWDEN, Ellen G. v. Department of Agriculture
(SE315H8210011)

DUVLEA, Marian R. v. U.S. Department of
Transportation, Federal Aviation Administration
(CH07528110711)

ECHOLS, Earvin v. Defense Logistics Agency
(AT07528110263)

EDWARDS, Daniel L. v. Office of Personnel Manage-
ment (CH831L8110611)

EPPERSON, Gordon L. v. Department of the Treasury
(CH07528010125)

FELTER, Juanita H. v. Department of Commerce
(AT03518110083)

FERGUSON, Joyce v. Veterans Administration
(NY315H8110304)

FINLEY, Barbara v. Department of Transportation
(SF07528111906)

FRAILEY, Frank W. v. Department of the Army
(DE07528110132)

GREEN, Simone M. v. Department of the Army
(SE07528110002)

GREUBEL, Frank v. Veterans Administration
(SL07528110037)

GUHL, William F. v. Defense Logistics Agency
(CH34438110418)

HATCHER, Dorothy A. v. Department of Health and
Human Services, Social Security Administration
(PH07528110340)

HINGSBERGEN, Thomas v. Department of the Navy
(SF300A8010542)

HOBBS, Thomas v. Department of the Air Force
(DA07528110104)

HOBSON, William L. v. U.S. Postal Service
(PH07528210075)

HOLZRICHTER, Audrie L. v. Department of the Air
Force (DE03308110049)

JACKSON, Mary E. v. Department of Army
(AT07528010353)

JOHNSON, Evelyn V. v. Department of the Air Force
(SF07528110563)

JONES, Burlene v. U.S. Postal Service
(SF03538110570)

KENDRICK, Elaine C. v. Veterans Administration
(DC07528010146)

KENNEDY, Sanford v. Veterans Administration
(PH03518110319)

KETCHEM, John C. v. Department of Transportation
(DA075281F0713)

KILLINGSWORTH, George F. v. Department of
Health and Human Services (SF03518110645)

KLEIN, Hubert H. v. Office of Personnel Management
(DA831L8010252)

LANDRY, Paul H. v. Office of Personnel Management
(BN08318010042)

LIPPINCOTT, Linda v. U.S. Defense Logistics Agen-
cy (CH07528010028)

LOGUE, John P. v. U.S. Postal Service
(PH07528010208)

LUCAS, Stella v. Department of the Army
(SF531D8110640)

MADNICK, Allan W. v. Department of the Navy
(NY07528110180)

MASON, John A. v. National Aeronautics and Space
Administration (DA34438110275)

MCDANIEL, Trudy L. v. Department of the Interior
(AT03518110627)

MCKINNEY, Bryant D., Jr. v. Tennessee Valley
Authority (AT34438110672)

MILLS, Barbara J. v. Department of the Navy (PH07528110430)

MOBLEY, Carolyn v. Department of Health and Human Services (NY07528010102)

MOORE, Kenneth v. Department of the Army (SF07528110391)

NASH, Gwendolyn T. v. Department of Health and Human Services (DE300A8110005)

NASH, Merry L. v. Department of the Treasury (NY07528110277)

NELSON, Ailene v. Department of Health and Human Services (SL07528110193)

NESSON, Janice W. v. Department of the Treasury (PH04328110123)

OLIVER, James v. United States Postal Service (DA07528110242)

PATTERSON, E. Arthur v. Department of the Interior (SE035199001)

PENN, Frances v. Department of Justice (NY07528110145)

PETERS, George W. v. Department of Navy (DC03518010077)

PINTO, Robert G. v. Department of Labor (DE07528010140)

PITTMAN, Herman D. v. Office of Personnel Management (DC831L8110526)

PLOG, Harold G. v. Department of the Treasury (NY07528210115)

POLK, Janeice V. v. Internal Revenue Service (DA531D8110084)

QUINN, James K. v. Office of Personnel Management (DA831L8110115)

RIAS, Ulysses v. Veterans Administration (PH07528110044)

RISHER, William R. v. Department of the Army (DC03518110236)

RODRIGUEZ, Donna M. v. Department of the Army (SE07528110006M)

RYAN, Joyce J. v. Veterans Administration (SF07528111051)

SALISBURY, L. Leon, Jr. v. Department of Justice (DC07528110577)

SANDERS, Eddie G. v. Veterans Administration (DA07528110056)

SKAARER, Timothy L. v. Department of the Air Force (DA300A8010244)

SMITH, Nancy S. v. Office of Personnel Management (DA831L8110587)

SPRINGER, Matilde T. v. Department of the Army (DC07528110209)

STANKIS, Glenn A. v. Environmental Protection Agency (DA531D8090007) and (DA531D8090013)

STOCKTON, Terry v. Department of the Navy (SF07528110536)

TALSTROM, Frederick v. Department of the Army (DC315H8110821)

THOMAS, Drennell v. Department of Commerce (AT03518110083)

THOMPSON, Patrick J. v. United States Coast Guard (NY07528110166)

TOJINO, Ricardo v. Department of the Army (SF07528110562)

TURANSKY, Lenore F. v. Veterans Administration (PH07528110175)

WAFFORD, James E. v. Department of the Air Force (SF07528110949)

WILLIAMS, McKinley v. Department of the Army (DA07528110628)

WOODWARD, Curtis R., Jr. v. Tennessee Valley Authority (AT07528110443)

PETITIONS FOR REVIEW DISMISSED

NUNEZ, Rafael v. U.S. Postal Service (CH07528110474)

PARRIS, Homer v. Office of Personnel Management (DA831L8110411)

AGENCY PETITION FOR REVIEW GRANTED

CARROLL, Donna v. Department of Health and Human Services (AT531D8090007)

INITIAL DECISIONS REVERSED

CLARK, Haywood, Jr. v. Government Printing Office (DC07528010293)

COLYOTT, Woodrow R. v. Department of Agriculture (SE07528110067)

CURRAN, James H. v. Department of the Treasury (SE07528110070)

EVANS, Dennis v. Department of the Navy (SF07528010001)

GREEN, Vincent v. Department of the Navy (PH07528110039)

JACKSON, Clive M. v. Defense Logistics Agency (SF07528010154)

LLOYD, Richard L. v. Department of the Navy (SE531D8110094)

NASH, Edna M. v. Office of Personnel Management (AT831L8110342)

NELSON, Morris J. v. United States Postal Service (SF075209049)

ROBINSON, Robert J. v. Office of Personnel Management (AT831L8010193)

WOODB, Ethel M. v. Department of Justice, U.S. Marshals Service (PH07528010142)

INITIAL DECISIONS AFFIRMED OR AFFIRMED AS MODIFIED

APPLEMAN, Orrin A. v. Office of Personnel Management (DA831L8110213)

BEACHBOARD, John v. Department of the Army (SF300A8110639)

BECHTEL, Dwight E. v. Office of Personnel Management (AT07528010222)
 BURTON, George v. U.S. Postal Service (CH07527990022)
 BYE, Karen E. v. Office of Personnel Management and Internal Revenue Service (SF300A8110575)
 D'AGOSTINO, Norma M. v. Office of Personnel Management (PH831L8110196)
 FREGOSI, Edward v. Office of Personnel Management (NY08318110161)
 GALLAGHER, Neil L. v. Department of Labor (PH07528110284)
 GARNER, Edith F. v. Department of the Army (AT07528010356)
 HOLLAND, Dixie L. v. U.S. Department of Agriculture (SF531D8110545)
 JACKSON, Franklin v. United States Department of Housing and Urban Development (DE531D8110058)
 KHAN, Ruth v. Office of Personnel Management and Internal Revenue Service (SF300A8110578)
 KING, Nancy S. v. Department of Health and Human Services (SF07528010349)
 LANGSTER, Lee V. v. Department of Health and Human Services (CH300A8110131)
 LE FLORE, Donald A. v. U.S. Postal Service (SF07528110404)
 LOWELL, Linda B. v. Department of the Air Force (DA07528010300)
 MURPHY, William v. Department of the Air Force (DA07528110147)
 NAGEL, James B. v. Department of Health and Human Services (DC07528010386)
 PFEIL, Church B. v. Office of Personnel Management (NY831L8110111)
 PRINCE, Alfred v. Department of Transportation (DC03518110224)
 RENEHAN, John L. v. Department of the Army (PH531D09011)
 ROBERTS, Amy H. v. Department of the Army (AT07528010354)
 SEIBEL, Kim A. v. Department of the Air Force (AT07528010033)
 WILLIAMS, ERICK N. v. Veterans Administration (PH07528090045)

CASES REMANDED TO REGIONAL OFFICES

CAPOZZELLA, Vincent J. v. Federal Bureau of Investigation (PH07528110103)
 GAYDEN, Marlene C. v. Department of Health and Human Services (CH03518210215)
 GLOVER, Franklin D. v. U.S. Government Printing Office (DC07528110390)
 GONZALES, Joe A. v. U.S. Postal Service (DA07528110361)
 JOHNSON, Billy L. v. Department of the Army (DC03518010275)

MUTTIE, Joseph D. v. Department of the Navy (NY07528110138)
 QUAREZO, Cristobal C. v. Office of Personnel Management (SF08318111217)
 STEVENS, Ann L. v. Office of Personnel Management (CH831L8110457)

INITIAL DECISIONS VACATED AND APPEALS DISMISSED

AHMED, Abul A. M. v. Environmental Protection Agency (DC315H8110448)
 BATCHELDER, Merton J. v. Department of the Army (DC531D8010167)
 HALL, Marjorie v. Office of Personnel Management (DA300A09002)
 RINDFLEISH, Lisa A. v. Office of Personnel Management (BN300A8110120)

BOARD REVERSED REMOVAL/SUSPENSION ACTION AND OTHERWISE AFFIRMED INITIAL DECISION

BARNER, Ulysses R. v. U.S. Postal Service (DA07528090154)
 DAVIS, Willie L., Jr. v. Tennessee Valley Authority (AT07528110206)
 ORIAS, Eugene B. v. Department of the Navy (SF07528010329)
 THOMAS, Valerie v. Department of Health and Human Services (PH07528010236)

CASES REOPENED BY THE BOARD

HARRIS, Elizabeth v. Office of Personnel Management (PH831L8010255)
 LENOX, Margaret, Appellant v. Office of Personnel Management, Respondent (DA08318210396)
 LENOX, Merle E., Appellant and Margaret Lenox, Intervenor, v. Office of Personnel Management, Respondent (DA08318210253)

INITIAL DECISION REVERSED, APPEAL DISMISSED, MOTION TO CONSOLIDATE DENIED

WOOLARD, Doris E. v. Department of the Army (PH075209169)

PETITIONER'S REQUEST FOR A STAY OF BOARD'S FINAL ORDER DENIED

DUCKETT, Jessie E. v. Tennessee Valley Authority (AT07528010325)
 YARDLEY, John S. v. Tennessee Valley Authority (AT0728010325)

REQUEST FOR RECONSIDERATION OF PREVIOUS ORDER DENIED

KETCHEM, John C. v. Federal Aviation Administration (DA075281F0713)

**RESPONDENT ORDERED IMMEDIATELY
SUSPENDED WITHOUT PAY**

SPECIAL COUNSEL v. Johnny A. Tacker
(HQ120600027)

**OFFICE OF PERSONNEL MANAGEMENT
ORDERED TO SUBMIT BRIEF**

LOSURE, Jean Hoover v. Interstate Commerce Commission (DC035199008ADD)

**AGENCY MOTION TO SEAL DOCUMENTS
GRANTED**

WILLIAMS, James W., Jr. v. General Services Administration (DE07538110040)

CASES UNDER THE SPECIAL COUNSEL

SPECIAL COUNSEL v. Department of Labor
(HQ12068010001)

SPECIAL COUNSEL v. Housing and Urban Development (HQ12088210004)

**CASES ASSIGNED TO ADMINISTRATIVE LAW
JUDGES**

In the Matter of: Stanley M. Balahan, Administrative Law Judge, Social Security Administration, Department of Health and Human Services (HQ75218210014)

In the Matter of: Robert W. Goodman, Administrative Law Judge, Social Security Administration, Department of Health and Human Services (HQ75218210015)

In the Matter of: Irving Shore, Administrative Law Judge, Social Security Administration, Department of Health and Human Services (HQ75218210013)

SPECIAL COUNSEL v. James C. Cummings, Jr.
(HQ12068210019)

SPECIAL COUNSEL v. Nathaniel Sims
(HQ12068210011)

SPECIAL COUNSEL v. Susan M. Suso
(HQ12068210017)

SPECIAL COUNSEL v. Dale W. Yoho and Lawrence County Pennsylvania (HQ12068210016)

REQUESTS FOR EXTENSIONS OF TIME DENIED

CARTER, William J. v. Department of the Interior
(DA03518210134)

HALL, Bert E., Jr. v. General Services Administration (PH07528210099)

HOLMES, Gregg E. v. Department of Transportation, Federal Aviation Administration (DA075282F0024)

KERR, John H. v. National Endowment for the Arts
(BN07528010004COMP.)

KETCHEM, John C. v. Department of Transportation, Federal Aviation Administration (DA075281F0713)

MOORE, William W. v. General Services Administration (PH07528210059)

**REQUESTS FOR EXTENSIONS OF TIME
GRANTED**

ADKINS, Alfred J. v. Federal Communications Commission (DC07528210366)

APODACA, Allen T. v. Department of Education
(SE03518210060)

BAIN, Kenneth, Jr. v. Department of Justice
(PH07528210105)

BAJWA, Rajinder S. v. Department of Agriculture
(DC531D8210383)

COWLES, Floyd R. v. Office of Personnel Management (DE08318210047)

IRELAND, Michael N. v. Department of Health and Human Services, Social Security Administration
(PH07528210173)

JONES, Israel v. U.S. Postal Service
(NY07528210174)

KERR, John H. v. National Endowment for the Arts
(BN07528010005-Comp.)

LAWS, Louise v. Department of Defense
(CH07528210098)

MARBRAY, James N. v. Department of the Navy
(DC07528210478)

MATTHEWS, Frank v. Office of Personnel Management (AT07528210378)

MOSKI, Douglas Wayne v. Department of the Air Force (AT315H8210501)

NUOVO, Fedela v. Department of the Interior
(SF07528111903)

PADILLA, Sandy v. Equal Employment Opportunity Commission (SF07528110845)

PERDUE, Selmar, Jr. v. Veterans Administration
(CH07528210126)

ROBERTS, Joseph P. v. Veterans Administration
(SF07528111065)

RYBA, Vincent J. v. U.S. Department of the Navy
(DC03518210219)

SCHULDER, Daniel J. v. Department of Commerce
(DC03518210396)

SNYDER, Joseph v. Department of the Army
(NY07528210107)

STECHLER, Bernard v. Department of Energy
(NY03518210062)

STOCKMAN, Rita M. v. Department of the Army
(AT07528210341)

TRAVAGLINI, Carla B. v. Department of Education
(DC07528110641)

WARD, Lacy B. v. U.S. Consumer Product Safety Commission (PH07528010360)

WEBB, Renea A. v. U.S. Consumer Product Safety Commission (PH07528010307)

WHITE, Bernard v. U.S. Postal Service
(NY07528210187)

ERRATA

ADAMS, Alfred J. v. Federal Communications Commission (DC07528210306)

HELLMAN, Donald L. v. Office of Personnel Management (AT300A7990002)

MOORE, William W. v. General Services Administration (PH07528210081)

JUNE CASES

ADVERSE ACTIONS

DIANE T. KOMORA v. VETERANS ADMINISTRATION (Docket No. CH07528110507)

June 16, 1982

1.110; 1.311; 8.420; 8.423; 10.1322; 15.131

Appellant was removed based on the Office of Personnel Management's (OPM) denial of her application for disability retirement and her absence from duty in a leave without pay (LWOP) status for approximately four years.

The presiding official reversed the agency's action in the initial decision. The presiding official found that OPM's failure to grant appellant's disability retirement application did not constitute a valid basis for removing her. The presiding official also found that an appellant's extended absence from work in an approved leave status was insufficient grounds for an adverse action in the absence of proof that the agency had advised appellant to return to work by a specified date or face removal for continued absence. In addition, the presiding official noted that the agency failed to produce evidence that it needed to fill the position with a productive employee.

In its petition for review the agency argued that it had fully complied with OPM's regulations at 5 C.F.R. §353.307. The agency also argued that the initial decision would require an agency to carry an employee in a LWOP status indefinitely. The Board found the agency's arguments to be without merit. Part 353 of 5 C.F.R. involves an employee's right to restoration to his former position and was inapplicable to this case. The agency's reliance on section 353.307 was misplaced in that the OPM regulation provides priority consideration for restoration to employees who are separated because of a compensable injury. The record in this case showed that appellant was receiving compensation for an injury she had sustained, but that her separation was not due to her injury. The record, in fact, showed that appellant was in an approved leave status during the time.

The Board has held previously that when granting an employee's request for LWOP, an agency gives its official approval to the absences and, therefore, an employee's instances of LWOP should not be the basis for an adverse action. The Board also held that although it would be inequitable to allow an agency to take an action against an employee solely on the basis of his using approved leave, removal for prolonged

absence has been considered just cause for removal. The Board, however, agreed with the presiding official that before removing appellant, the agency should have advised her to report to work or face dismissal. The Board stated that the agency was obligated to show that the appellant's position needed to be filled by an employee on a regular basis.

The Board found that the agency did not show an adequate basis for removing appellant and that the presiding official's reversal of the agency action was proper.

The Board, therefore, denied the agency's petition for review and ordered the agency to cancel the removal.

HAROLD W. MARTIN v. DEPARTMENT OF TREASURY, U.S. CUSTOMS SERVICE (Docket No. AT075209044)

BRUCE BROWN and DANIEL CHAREST v. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE (Docket No. SF075209127)

DIRK A. DICK and JEFFREY OTHERSON v. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE (Docket No. SF075209119)

June 1, 1982

1.120; 1.330; 1.3311; 1.367; 1.368; 4.126; 10.114; 10.12111

Each of the above-listed appellants was indefinitely suspended. 5 U.S.C. §7501(2) defines a suspension as the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay. The Board found that the most essential criterion of an action, if it is to meet the definition, is that it be temporary. Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension. The Board noted that although the time duration of the action may not be determinable, an indefinite suspension continuing beyond the given point of termination would be improper. Such an action, imposed with no ascertainable end in sight, would not be sustainable as a suspension because of failure to meet the criterion of temporariness. The indefinite suspensions were all taken pursuant to the shortened notice period provided for by 5 U.S.C. §7513(b)(1). The Board found that the cases presented similar issues and therefore consolidated them for adjudication.

The Department of Justice moved to have appellant Dick's appeal dismissed since Dick submitted his resignation retroactively effective on the date of his suspension. Accordingly, since the record reflected that appellant Dick no longer had an appealable action before the Board, the Board dismissed his appeal.

Appellant Martin was indefinitely suspended on charges of unauthorized interception of oral communications, conduct prejudicial to the best interest of the service, and interfering with the rights of another. The record indicated that the agency had received a preliminary investigative report and that further investigation was ongoing. The Board found the continuing investigation, the actual evidence obtained, and the fact that the matter was referred to the U.S. Attorney for investigation and possible action provided sufficient basis for reasonable cause. The Board also found that while an investigation should not form the basis for an indefinite suspension, it may provide such a basis where it is accompanied by evidence which is sufficient to afford reasonable cause to believe. Further, the Board found that the ongoing investigative process and referral to the U.S. Attorney supported the temporary nature of the suspension. Finally, the Board found that the suspension action was reasonable and promoted the efficiency of the service. Accordingly, the indefinite suspension action taken against Martin was sustained.

Otherson, Brown and Charest were indefinitely suspended from the positions of border patrol agents when they were indicted for conspiring to deprive and actually depriving persons of their civil rights. The Board agreed with the presiding official that the suspensions were based upon reasonable cause to believe that crimes had been committed for which sentences of imprisonment could be imposed, and that the charged offenses bore a direct relationship to appellant's duties. The Board also agreed that since the appellants had been indicted and criminal proceedings were ongoing, the suspensions contained clear conditions subsequent and could be considered temporary. The issue was whether the agency had proven the reasonable necessity for the suspensions since, in view of the evidence, the appellants were not suspended but reassigned pending resolution of the charges against them.

Appellants were charged with conspiracy and with committing several incidents of planned, brutal behavior toward aliens. Cases of other employees who were reassigned due to similar circumstances did not contain charges of such behavior as was allegedly engaged in by these appellants. In view of the nature and seriousness of the charges and the direct relationship between the charges and appellant's positions

and the agency's mission, the Board found that the indefinite suspensions were reasonably necessary. Accordingly, the actions taken against Otherson, Brown and Charest were sustained by the Board.

In sustaining the indefinite suspensions in these cases, the Board did so only for the duration of the investigations and until the criminal proceedings were resolved. The board found that continuance of the suspensions beyond such time was unauthorized.

In examining the record as to the current status of the cases, the Board found that Charest's record indicated that he was acquitted and that his suspension was thereupon terminated; that Otherson was convicted of conspiracy to deprive civil rights and deprivation of civil rights, fined and sentenced, and that there was no information as to what action, if any, was taken by the agency with respect to Otherson following his conviction; that the records on Brown and Martin were lacking current information regarding their proceedings.

Accordingly, the initial decisions in the cases of Martin, Brown and Charest were affirmed as modified. The initial decision in the case of Dick was vacated and the appeal was dismissed. The initial decision in the case of Otherson was reversed.

ALAN MAXFIELD v. DEPARTMENT OF TRANSPORTATION (Docket No. DE07528110038)
June 2, 1982

1.110; 1.345; 4.120; 4.125; 10.130

Appellant filed a petition for review of an initial decision sustaining his removal for "intentionally disabling FAA electronic equipment used to control air traffic." Appellant contended that the presiding official's conclusion that the agency action was supported by a preponderance of the evidence was not supported by the record.

The agency contended that someone pressed a shutoff button on the terminal system causing a stop light to go on and causing the terminal system used to control air traffic to fail. The agency contended that the appellant was observed a short time after—at a location which would have given him enough time to shut down the system by pressing the stop button on the control panel—descending the stairs and departing the control tower. Appellant's supervisor and a truck technician claimed to have passed appellant travelling in the opposite direction from which they were going to the control tower. Two other workers at

the tower claimed they observed appellant immediately after the time reported for the shutdown, leaving via a different route, which appellant also claimed to have taken.

In the initial decision, the presiding official credited the testimony of the supervisor and the technician because he found that they were closer to appellant at the time they saw him and could discern his physical features, while two other workers, who were on the sixth floor of the tower, could only identify appellant's motorcycle. Moreover, the presiding official concluded that the appellant was the only one with the opportunity to cause the outage; that appellant's testimony was self-serving; and that no evidence was introduced which would show that either the supervisor or the truck technician had a dislike for appellant or would benefit from his removal.

The Board found that contrary to the presiding official's findings, neither the supervisor nor the technician were able to discern appellant's physical features and thereby identify him. Moreover, the Board rejected the notion that appellant's testimony deserved less weight because it was self-serving. The Board noted that most testimony is self-serving to some degree and found appellant's testimony to be of significant value because it was corroborated by two other workers who did not work with appellant. The Board was not persuaded by the presiding official's reasoning that no evidence was presented that either the supervisor or the truck technician disliked appellant or would benefit from his removal. The Board held that the same observation could be made for crediting the testimony of the two workers who did not even work with appellant. Further, the Board found that the record failed to support the presiding official's finding that appellant was the only person who had the opportunity to cause the outage.

The Board has held previously that it is not bound by the presiding official's findings of fact in reviewing an initial decision, but may substitute its own factual determinations giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning. In view of the conflicting evidence regarding the route appellant took after he left the tower; the paltry evidence that because appellant did not like the updated system he may have had a motive to cause the outage; and the undisputed showing that other persons had access to the system and therefore had equal opportunity to shut down the system, the Board felt that it could not agree with the presiding official's conclusion that the agency proved by a preponderance of the evidence that appellant deliberately

caused the outage by pressing the stop button on the terminal system.

Accordingly, the initial decision and the agency action were reversed and the agency ordered to cancel the removal.

GEORGE H. WILSON v. U.S. DEPARTMENT OF THE NAVY (Docket No. PH07528110091)

June 3, 1982

1.110; 1.310; 1.371; 1.400; 1.410; 1.420; 3.130; 3.1313; 3.1321; 4.125; 4.250; 6.330; 14.700

The agency petitioned the Board for review of an initial decision reversing its action removing appellant based on a charge that appellant was absent without (AWOL) for eight hours. The agency had also considered two prior offenses in determining the removal action.

The presiding official found the charge to be proven by a preponderance of the evidence, but held that appellant's removal was not for such cause as would promote the efficiency of the service under 5 C.F.R. §7513(a), and reversed the removal action. The Board reviewed the agency's arguments, and found that the agency merely disagreed with the presiding official's findings of fact, credibility determinations and interpretation of evidence. The agency did not establish a misapplication of the standards of proof, nor did the agency establish that the initial decision was based on an erroneous interpretation of statute or regulation. 5 C.F.R. §1201.115(b). The Board felt that the petition implicitly raised questions concerning the accommodation that was afforded appellant for his alcoholism and efforts at rehabilitation and the appropriateness of the penalty. In the Board's view, these issues were not adequately discussed in the initial decision.

In *Ruzek v. General Services Administration*, MSPB Order No. SL075209017 (August 20, 1981), The Board determined that alcoholism constitutes a handicapping condition under the Rehabilitation Act of 1973 as it relates to Federal employees. The Board further held that an agency must offer the employee rehabilitative assistance and allow him an opportunity to take sick leave for treatment, if necessary, before initiating any disciplinary action for continuing performance or misconduct problems related to his alcoholism. *Id.* at 8.

In this case, the record indicated that the agency recognized appellant's problems, counseled the appellant and offered him the opportunity to participate in a rehabilitation program. Appellant rejected the agency's offer. The appellant failed to meet his burden of persuasion to establish a case raising an inference of handicap discrimination.

The Board previously determined that it does have the authority to modify or reduce an agency-imposed penalty, and, where the agency's decision to impose a penalty involves factual considerations, the preponderance of the evidence applies. The Board also determined that the scope of its review of an agency-imposed penalty is to insure that the agency conscientiously considered the relevant factors and struck a

responsible balance within the limits of reasonableness.

The presiding official concluded that the penalty of removal for three separate eight hour absences over a period of more than 13 months was excessive and that appellant's removal would not promote the efficiency of the service. Although the agency's Guideline Schedule of Penalties provides a range of a five-day suspension to removal for a third offense of unauthorized absence, the Board concluded that the penalty of removal was unduly harsh and unreasonable, and that an alternate sanction would be more appropriate in this case.

Accordingly, the Board found a 30-day suspension to be the maximum reasonable penalty.

OTHER JUNE ISSUANCES

PETITIONS FOR REVIEW DENIED

ACKERMAN, Donald L. v. Office of Personnel Management (DA08318110520)

ADAMS, John R. v. U.S. Postal Service (BN07528010002)

AGRO, David T. v. Department of Energy (DC531D8110141)

ALMOND, Pat v. U.S. Postal Service (DA07528010169ADD)

ARMORER, Audra V. v. Department of Health and Human Services, Social Security Administration (NY07528110058)

BACON, Edna M. v. Veterans Administration (SF07528110423)

BAKER, Charles R. v. Department of the Army (DE07528110158)

BAKER, Michael Scott v. U.S. Postal Service (SE531D8110213)

BARNETT, Lucille C. v. Veterans Administration (AT07528010324)

BARRICELLA, Frances L. v. Veterans Administration (PH07528110220)

BARTLETT, Raymond D. v. United States Postal Service (NY07528110047)

BEELEER, Richard E. v. Department of Agriculture (SF07528111048)

BETTS, Anne H. v. Department of the Army (DC035109086)

BROWN, James O. v. Department of Labor (NY531D8110282)

BRYANT, Chester v. General Services Administration (SF07528010403)

BULLITT, Ernest, Jr. v. United States Postal Service (CH07528110111)

BURNETTE, Clarence G. v. U.S. Postal Service (AT07528110368)

CAPONETTO, Carolyn R. v. Office of Personnel Management (SF831L8110671)

CASTLE, James E. v. U.S. Department of Agriculture, U.S. Forest Service (SF07528110569)

CAVE, Patricia A. v. U.S. Postal Service (NY03538110250)

COMPTON, Robert v. Department of Energy (SL035109001ADD)

COOK, Donaldson v. Office of Personnel Management (DA08318110578)

COOPER, Lee W. v. U.S. Marine Corps (SF07528010344)

COX, Peggy J. v. U.S. International Trade Commission (DC07528090042)

DAVIS, Paul V. v. Department of the Army (DC07528110456)

FELLMAN, Mary K. v. Veterans Administration (SL07528110045)

FLORES, Lisa A. v. Farmers Home Administration (SL315H8110192)

GELLERMAN, James R. v. Veterans Administration (CH07528110093)

GLOSTER, Ruth O. v. General Services Administration (DC07528110606)

HALL, Kenneth L. v. Department of the Air Force and Office of Personnel Management (DE300A8110096)

HAMPTON, Haston C. v. Veterans Administration (PH07528110541)

HEADDS, Aaron v. U.S. Postal Service (AT07528110523)

HERMAN, Donald F. v. Department of the Air Force (SF07528111079)

HERNANDEZ, Lewis T. v. United States Postal Service (SF07528110634)

ISZA, William V. v. Department of the Army (SF07528110055)

IYOTTE, Patrick N. v. United States Department of the Interior (DE07528110042)

JONES, Lorenzo v. Department of Education (DC315H8110758)

KELLEY, Eugene v. Department of the Air Force (SF07528110969)

KERR, Ethel v. Department of Health and Human Services (SF531D8110132)

KREPO, Donald E. v. U.S. Department of Energy (DC03518210251)

KUWADA, Darryl v. Department of the Navy (SF07528110615)

LATTANZI, Celeste M. v. Department of Health and Human Services (BN07528110086)

LEDDY, John J. v. Office of Personnel Management (NY07528110105)

LEMOND, Jack v. U.S. Postal Service (DA03538110481)

LLOYD, Gordon C. v. U.S. Department of Agriculture, U.S. Forest Service (SF07528110691)

LONG, Whitfield v. Veterans Administration (DA07528110310)

LOPEZ, Juanita S. v. Veterans Administration (DA07528110066)

LORENZ, Paul v. Department of Interior (DE03518110173)

LITTLEFIELD, Clyde R. v. Department of the Air Force (DC07528110299)

MARION, Gerald J. H. v. U.S. Department of the Navy (DC07528010304)

MARLOWE, Don W. v. Department of the Navy (SE07528110085)

MARTINEZ, Wilfred P. v. Department of the Air Force (HQ71218110053)

MCCALLISTER, Carolyn v. Government of the District of Columbia (DC34438010091)

MCQUERTER, Zeldar v. Department of the Army (SE07528110016)

MIDDLETON, Robert E., Sr. v. Department of the Army (AT07528010358)

MILLER, Green, Jr. v. Department of Transportation, Urban Mass Transportation Administration (DC03518210766)

MITCHELL, Robert L. v. U.S. Veterans Administration (SL07528110005)

MONDAY, Al v. Department of Health and Human Services (NY315H8110328)

MORGAN, Jerry L. v. Department of the Army (AT07528110184)

MORRIS, Charles R. v. Department of the Navy (DC07528110372)

MURPHY, Walter F., Jr. v. Department of the Air Force (DE34438110151)

MYCKA, Ronald D. v. Office of Personnel Management (DC831L8090009)

NEWTON, Kenneth E. v. Department of the Navy (SF315H8110373)

NOWAK, Jean M. v. Small Business Administration (DC03518010075)

OCCORSO, Angelo v. U.S. Postal Service (PH07528110238)

O'NEIL, Loraine J. v. Department of Transportation, Federal Aviation Administration (BN07528110063)

PARSONS, Elce v. Department of the Air Force (DA07528110393)

PATTERSON, Dale S. v. Veterans Administration (AT07528110370)

PENNINGTON, J. C. v. Department of Health and Human Services (AT07528010094)

PENTACOST, Edwin D. v. Department of Agriculture (DE07528110239)

POWANDA, John N. v. Department of Defense (DC315H8110777)

POWELL, William N. v. Department of the Air Force (CH34438210118)

POWERS, Louise D. v. Department of the Army (DC531D8110883)

PRESIDENT, Marvin E. v. Department of Justice (DA07528110026)

REETER, Robert W. v. Department of the Navy (AT34438110437)

RHOADS, George v. Department of the Treasury (PH07528110217)

RICHEY, Clarence v. Department of Health and Human Services (CH07527990060)

RIVAS, Andrew v. Department of the Navy (SF315H8111897)

ROSSER, Thomas v. Department of the Air Force (AT03518110585)

SHAW, Robert J. v. General Services Administration (PH07528110187)

SMALLS, Leonard H. v. Department of the Navy (AT07528110160)

SMYTH, Donald v. Department of the Treasury (CH075209204)

STANKIS, Glenn A. v. Environmental Protection Agency (DA531D8110205) and (DA531D8110501)

SWINDELL, Willie J. v. Veterans Administration (NY07528110114)

TACCONE, Grace v. United States Postal Service (SF07528110417)

TRAVIS, William A., Sr. v. Office of Personnel Management (DE831L8110102)

TURNER, Michael J. v. Department of Housing and Urban Development (DE531D8110125)

WELSH, Joseph v. Federal Aviation Administration (NY035118210036)

WILFORD, Dennis I. v. Department of the Navy (SE075209042)

WILLIAMS, Rudolph v. Department of Commerce (DC03518110465ADD)

WILSON, Elizabeth v. Office of Personnel Management (CH831L8110526)

WOOTEN, Stanley J. v. Department of the Air Force (SF03518110413)

PETITIONS FOR REVIEW DENIED – AIR TRAFFIC CONTROLLERS

BONEFAS, James W. v. Department of Transportation, Federal Aviation Administration (DA075281F0684)

CHACON, Gerardo v. Department of Transportation, Federal Aviation Administration (DA075281F1032)

HALES, David E. v. Federal Aviation Administration (AT075282F0090)

MATSAYKO, Vincent J. v. Department of Transportation, Federal Aviation Administration (DA075281F1581)

MORTON, James v. Department of Transportation, Federal Aviation Administration (DA075281F1364)

RAWLS, Ashburn, Jr. v. Federal Aviation Administration (AT075282F0265)

RAYNOR, John E. v. Federal Aviation Administration (AT075281F0094)

PETITIONS FOR REVIEW DISMISSED

ADAMS, Melvin v. U.S. Postal Service (CH07528110601)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 2094 (Glenn Scott) v. Veterans Administration Medical Center (HQ71218210012)

ARNOLD, Harold M. v. United States Marine Corps (AT07528110891)

BATTLES, William H. v. Department of the Army (HQ71218110045)

BEDFORD, Howard Ray v. Department of the Air Force (HQ71218010049)

CARRUTHERS, Harold v. Defense Logistics Agency (AT07528110492)

JOHNSON, Donald A. v. United States Postal Service (SF07528010346)
OFFICE OF LEGISLATIVE AND PUBLIC AFFAIRS LEGAL DEFENSE COMMITTEE, Petitioner v. Theodore Bell and Donald Devine (HQ12058210003)
WINNETT, William D. v. Department of the Treasury (AT07528210004)

INITIAL DECISIONS AFFIRMED OR AFFIRMED AS MODIFIED

HIGGINS, Joseph J. v. Department of Health and Human Services (DC07528010318)
HOLCOMBE, Thomas L., Jr. v. Veterans Administration (AT075299076)
JACKSON, Frederick J. v. Department of the Treasury (DE07528110072)
KIERNAN, Patrick v. Department of the Army (SF07528110646)
LAUGHLIN, Thomas J. v. U.S. Postal Service (CH07528110313)
LEMONS, Billy J. v. Department of the Air Force (DA752B90136)
LOFTON, Jimmy D. v. Department of Health and Human Services, Social Security Administration (SF07528110450)
MCGILL, Paul R. v. Tennessee Valley Authority (AT03518110335)
MORGAN, Arnold J. v. U.S. Postal Service (PH07528110274)
OMMAYA, Ayub K. v. National Institutes of Health, Department of Health and Human Services (DC53108010316)
PACE, William H. v. Veterans Administration (NY07528110128)
PELLUM, Nettie M. v. Veterans Administration (SF07528110228)
POPE, James C. v. Department of Transportation (SE07528210074)
WILLIS, Wilbur L. v. Department of the Army (SF07528110025)
ZEBEAU, Leonard R. v. Department of the Army (DA07528110041)

INITIAL DECISIONS REVERSED

BARBOUR, Andrew M. v. Department of Defense (PH07528110053)
CUSICK, Margaret v. U.S. Department of the Army (PH07528110188)
GAYHEART, Teddy B. v. Department of the Army (SF03518010525)
GREENE, Joseph R. v. Office of Personnel Management (AT831L8010350)
HATTRUP, Roger D. v. Department of the Navy (SE07528010082)
KIRKMAN, William E. v. Department of the Navy (PH075209105)

PERSON, Valerie D. v. Social Security Administration (CH07528110104)

CASES REMANDED TO REGIONAL OFFICES

JENKINS, Leroy v. U.S. Postal Service (AT07528110120)
LELAK, George v. Department of Health and Human Services (CH07528110184)
PRESTON, Terry A. v. Department of the Army (SE07528010061)
RICHARDSON, Nelson L. v. Tennessee Valley Authority (AT03518110299)
SARICH, John T. v. Department of the Interior, Bureau of Land Management (SE03518110035)

AGENCY ACTION AFFIRMED

BORSARI, Peter D. v. Federal Aviation Administration (NY075209163)

APPEALS DISMISSED

KEY, Eleanor F. v. Department of the Interior (SF03518010252)
RUBIO, Jesus v. Department of Health and Human Services (SF07528110666)

BOARD ORDERED THAT INITIAL DECISION IS FINAL DECISION

WILLIAMS, Richard L. v. United States Postal Service (DC075209236)

BOARD DISMISSED PETITION FOR REOPENING

ARNOLD, Harold M. v. U.S. Marine Corps (AT07528110891)

AGENCY ORDERED TO REMIT AWARD OF ATTORNEY FEES

BETZ, Helen L. v. U.S. Department of Housing and Urban Development (SF03518010228ADD)

COUNSEL ORDERED TO FILE BRIEF IN RESPONSE TO BOARD'S ORDER

LENOX, Margaret v. Office of Personnel Management (DA08318210396)
LENOX, Merle v. Office of Personnel Management (DA08318210253)

BOARD CONCURRED WITH AND ADOPTED DECISION OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

HANEY, Oscar Jr. v. U.S. Postal Service (DA075209252)

MOTION FOR RECONSIDERATION DENIED

BURROWS, Earl A., Jr. v. Government of the District of Columbia (DC03518010087)
MCKENZIE, Chester V. v. Government of the District of Columbia (DC03518010087)

WARD, C. Marvin v. Government of the District of Columbia (DC03518010087)

MOTION TO REVIEW INTERLOCUTORY RULING DENIED

CONWAY, Teresa A. v. Department of the Army (DC07528210755)

REGULATION REVIEW DENIED

JOSEPH, Warren M. v. Donald J. Devine, Director, Office of Personnel Management and Roscoe L. Egger, Jr., Commissioner, Internal Revenue Service (HQ12058110067)

CASES ASSIGNED TO ADMINISTRATIVE LAW JUDGES

EASTWOOD, Mary O. v. Office of Special Counsel (DC07528211225)

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION v. James L. Davis, Jr., Administrative Law Judge (HQ75218210026)

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION v. Kenneth P. Glover, Administrative Law Judge (HQ75218210025)

POPE, James C., Appellant v. Department of Transportation, Respondent (SE07528210074)

SCHWARTZ, Frederick W., Appellant, v. Department of Transportation, Respondent (DC531D8210170)

SPECIAL COUNSEL v. Guadalupe Saldana (HQ12068210023)

TRYBUL, Theodore S. v. Department of the Army (HQ35928210018)

CASES UNDER THE SPECIAL COUNSEL

SPECIAL COUNSEL v. Department of Labor (HQ120800009)

REQUESTS FOR EXTENSIONS OF TIME DENIED

JOHNSON, Delores v. Department of Housing and Urban Development (AT07528210364)

MCCLOSKEY, William v. Internal Revenue Service (PH531D8010040)

THOMPSON, James M. v. United States Postal Service (NY07528210135)

REQUESTS FOR EXTENSIONS OF TIME GRANTED

ADKINS, Ralph A. v. Department of Housing and Urban Development (AT07528110116)

CLARK, Julia G. v. Department of the Navy (AT07528210463)

FLANAGAN, Roxanne v. Department of Education (DC03518210640)

FROEHLICH, Vincent A., Jr. v. Internal Revenue Service (PH07528110476ADD) and (PH07528110606ADD)

JOHNSON, Delores v. Department of Housing and Urban Development (AT07528210364)

KERR, John H. v. National Endowment for the Arts (BN7528010005-Comp.)

MALAZO, Concepcion M. v. Internal Revenue Service (DC07528210484)

MARTIN, Sam A., et. al. v. Department of Labor, Mine Safety and Health Administration (SL07528210074)

MOORE, Clarence v. U.S. Air Force (SF07528111084)

OVERSTREET, Elizabeth A. v. U.S. Department of Energy (DC03518210464)

PHELPS, Frances M. v. Equal Employment Opportunity Commission (SF03518210430)

PRICE, Patricia D. v. United States Army, U.S. Army Corps of Engineers, Memphis District, Memphis, TN (AT07528110660)

PROTOPAPA, Sejfi v. Department of Transportation (BN03518210080)

SHERWOOD, Frank R., Jr. v. Department of Interior (DE03518210011)

WILLIAMS, James W., Jr. v. General Services Administration (DE07528210040)

YELLOWBIRD, Charles W. v. Department of Interior (DE03518210028)

ERRATA

BURROWS, Earl A., Jr. v. Government of the District of Columbia (DC03518010087)

LOFTON, Jimmy D. v. Department of Health and Human Services, Social Security Administration (SF07528110450)

MCKENZIE, Chester v. Government of the District of Columbia (DC03518010087)

RENEHAN, John L. v. Department of the Army (PH531D09011)

SMYTH, Donald v. Department of the Treasury (CH075209204)

WARD, C. Marvin v. Government of the District of Columbia (DC03518010087)

JULY CASES

ADVERSE ACTIONS

RONALD A. DOBROSKI v. DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE (Docket No. SF07528010278)

July 20, 1982

1.332; 4.210; 10.122; 14.700

Appellant filed an appeal with one of the Board's Regional Offices from a removal action based on the agency's determination that appellant, while in an off-duty status, violated Rule 21 of the agency's Table of Offenses and Discipline which prohibits employees from engaging in either criminal, dishonest, infamous or notoriously disgraceful conduct. The agency alleged that appellant entered a retail store, placed merchandise in his front pants pocket and departed the store without paying for the merchandise, and, that upon being approached by the store's security officers, appellant improperly displayed his law enforcement credentials. Appellant contended that he did not take the merchandise with the intention of not paying for it, and, that under the circumstances, the penalty was inappropriate.

In the initial decision, the presiding official reversed the removal action finding that the agency had not proven by a preponderance of the evidence that appellant had intentionally removed the merchandise from the store without paying for it; that appellant was not headed in the direction of the store's entrance so that he could pay for the merchandise; and, that the evidence of record did not sustain the specification that appellant had improperly displayed his law enforcement credentials.

The agency, in its petition for review, alleged that the initial decision was based on an erroneous interpretation of statute and regulation. The Board granted the petition for review, stating that the agency challenged factual determinations and that the petition for review made reference to specific evidence that supported the agency's position. The Board found that the record supported a finding that the conduct occurred. The Board stated that implicit in a charge of criminal, dishonest or disgraceful conduct for removing merchandise from a store without paying is the allegation that appellant did not intend to pay for it. The Board has previously stated that intent is a state of mind which is generally proven by circumstantial evidence. See *Filson v. Department of Transportation*, MSPB Order No. AT075209304 (July 14, 1981). The Board felt that appellant's admission that he left

the store without making payment for the merchandise was circumstantial evidence of wrongful intent, and facts leading to any inference had to be proven. The Board noted that the inference drawn when one places merchandise in his pants pocket instead of his shopping cart, covers it with his coat and walks out of the store without making payment, is that the act was intentional. The Board further noted that the facts on which this inference was drawn were admitted by appellant and supported by the testimony of two security officers. Contrary to the presiding official's determination, the Board concluded that this specification was supported by a preponderance of the evidence as required by 5 U.S.C. §7701(c)(1) and 5 C.F.R. §1201.56(a)(1)(ii).

The Board felt, having sustained only one of the two charges, that the efficiency of the service would be served by the imposition of some disciplinary action, but, in the absence of a prior disciplinary record, removal was not a reasonable penalty. The Board, therefore, determined that an appropriate penalty in this case was that appellant be downgraded to a non-supervisory position.

Accordingly, the initial decision was reversed in its finding that the agency specification was not supported by a preponderance of the evidence. The agency was ordered to cancel the removal action and to demote appellant to a non-supervisory position.

BERNARD MONCZEWSKI v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110443)

TIMOTHY SHOWS v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110442)

GERALD SMITH v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110441)

THOMAS VAUGHN v. DEPARTMENT OF THE AIR FORCE (Docket No. DA07528110423)

July 1, 1982

1.110; 1.600; 4.210; 11.140

Appellants were removed for their failure to comply with orders from their supervisor to return to their duty stations. The presiding official found that the evidence supported the charge, but, that the action was taken in reprisal for appellants' having testified at a grievance hearing.

The agency, in its petition for review, contended that the evidence did not establish a causal connec-

tion between the protected activity and the adverse action. The agency also argued that the removal should not have been reversed unless it was shown that the appellants would not have been removed but for their participation in the grievance proceeding.

The Board has previously determined that a claim of reprisal by an employee who testifies in a grievance proceeding constitutes an allegation of a prohibited personnel practice under 5 U.S.C. §2302(b)(9). See *Bodinus v. Department of the Treasury*, MSPB Order No. CH07528010016 at 5 (August 27, 1981). The presiding official in this case stated that an appellant, in establishing a prima facie violation of section 2302(b)(9) must demonstrate that he engaged in an activity protected by the section; that he subsequently was treated in an adverse manner by the employer; that the employee was engaged in the protected activity; and that there is a causal connection between the protected activity and the adverse action.

Appellants had engaged in the protected activity of testifying at a grievance hearing. Both the proposing official and the deciding official had actual knowledge that appellants had testified. The agency did not dispute the facts but contended that there was no showing of causal connection. The presiding official addressed the causal connection issue and set forth all the evidence to establish the connection. The record also reflected that the charges were connected to the participation of the appellants in the grievance hearing. The agency objected to the presiding official's reliance on the facts to support an affirmative defense of reprisal.

The Board, however, after considering the agency's contentions and the other evidence of record, and because the causal connection generally is drawn from circumstantial evidence such as that relied on by the presiding official, did not find that the agency showed any error in the presiding official's evaluation and conclusion in this connection. Therefore, the Board found that the appellants did establish prima facie evidence of violations of section 2302(b)(9).

The presiding official examined the appropriateness of the removal considering the seriousness of the offense, length of service, past disciplinary record, effect of the offense on performance, alternative sanctions to deter such conduct in the future and mitigating circumstances. The Board noted that in each case appellants failed to respond immediately to their supervisor's orders because the employee representative in the grievance had asked to speak to them. The delay in time was under five minutes. The presiding official found appellants' conduct to be minimal. The Board agreed with this evaluation and felt that man-

agement's concern was overstated and not serious enough under the circumstances to override the presiding official's finding. The presiding official decided that a written reprimand for this conduct was the most stringent penalty the agency should have considered and the Board agreed with this decision.

The Board, therefore, found that the agency did not establish any error in the presiding official's evaluations or conclusions in deciding to reverse the removals.

Accordingly, the initial decision in each case was affirmed.

ATTORNEY FEES AND DISABILITY RETIREMENT

ROLAND E. VERGAGNI v. OFFICE OF PERSONNEL MANAGEMENT (Docket No. DC831L8010270ADD)
July 19, 1982

6.100; 6.900; 14.520; 15.400

Appellant's application for disability retirement was disallowed by the Office of Personnel Management (OPM). On appeal to one of the Board's Regional Offices, the presiding official reversed OPM's determination and found appellant totally disabled for the performance of the duties of his position. Appellant timely filed for attorney fees pursuant to 5 C.F.R. §1201.37(a).

In his addendum decision, the presiding official concluded that under the standards set out by the Board in *Allen v. U.S. Postal Service*, 2 MSPB 582, 593 (1980) for determining the appropriateness of an award of attorney fees, appellant was entitled to an award of attorney fees.

In its petition for review, OPM failed to address the specifics of the presiding official's finding that attorney fees were warranted in this case. Rather, it contended that the provisions of section 7701 were inapplicable to the review of its retirement determinations and that the presiding official improperly awarded attorney fees under 5 U.S.C. §7701(g). The Board found no merit to OPM's jurisdictional arguments, but agreed that the award of attorney fees was improper in this case.

The Board noted that while section 7701 applies to all disability retirement matters, it found it necessary to consider whether an award of attorney fees to an applicant for disability retirement could be warranted in the interest of justice. The Board is accorded sub-

stantial discretion in determining when an award is warranted. However, the Board concluded that Congress did not contemplate attorney fees awards to be in the interest of justice in employee-initiated disability retirement cases. The Board further noted that applicants who voluntarily file for disability retirement could not be said to have been dragged through a lengthy and costly legal proceeding while substantially innocent of the charges leveled against them. Moreover, OPM does not level any charges against such applicants and does not initiate the proceedings. Except in cases involving agency-initiated disability retirement proceedings, the employee initiates the legal proceeding in order to establish his entitlement to benefits.

The Board further noted that the U.S. Court of Appeals for the D.C. Circuit stated, in regard to an award of attorney fees in Special Counsel Corrective Action proceedings, that the policy underlying the attorney fees provision contained in section 7701(g) is applicable to proceedings in which an aggrieved employee seeks to vindicate rights conferred by the Civil

Service Reform Act of 1978. The Board held that disability retirement applicants who appealed an OPM disallowance could not be considered aggrieved employees, since they initiated the statutory proceedings voluntarily.

Accordingly, the Board found that an administrative decision on an appellant's claim of entitlement to disability retirement annuity could not be considered an agency action within the meaning of section 7701(g). Therefore, the Board concluded that an award of attorney fees to an individual in a disability retirement proceeding could only be in the interest of justice in cases involving agency-initiated disability retirement actions taken pursuant to Part 831L of 5 C.F.R. The Board also concluded that since involuntary disability retirement proceedings are similar to adverse action proceedings, fees may be awarded only against the agency that initiated the proceeding, rather than OPM.

Accordingly, OPM's petition for review was granted and the addendum decision was vacated.

OTHER JULY ISSUANCES

PETITIONS FOR REVIEW DENIED

- ADDISON, Henry v. U.S. Department of Health and Human Services (PH07528110524)
- ALLEN, Hilburn D. v. Department of the Army (DC07528110452)
- ALVAREZ, Rosa v. Veterans Administration (DC03518110342)
- AMES, Michael v. U.S. Postal Service (DA07528010309)
- ANDERSON, Charles v. Department of the Navy (PH07528110470)
- ASHLEY, Marian E. v. Department of Housing and Urban Development (AT03518110469)
- AUSTIN, Virgil K. v. U.S. Department of the Air Force (DA07528010174)
- BACOTE, Ronald v. Department of the Navy (PH07528110057)
- BANKS, Lawrence v. Department of the Air Force (CH075209065)
- BARNWELL, Dinardo T. v. U.S. Government Printing Office (DC03518110355)
- BATTISTA, Jacqueline A. v. Department of the Army (DC07528110517)
- BEYARD, Audrey v. Department of the Navy (SF07528110357)
- BIVENS, Noel W. v. Department of the Interior (DE03518210016)
- BOYCE, Robert E. v. United States Postal Service (CH07528110613)
- BOYLAN, Vincent L. v. United States Postal Service (AT07528110462)
- BRANDENBURG, William, Jr. v. Department of the Air Force (DA315H8110644)
- BROWN, Bruce E. v. Department of Justice, Immigration and Naturalization Service (SF07528010170)
- BUESCHER, Wilbur L. v. Department of the Treasury (CH07528110105)
- BUTLER, Lester v. Department of the Interior (PH03308110450)
- BUTLER, Louis v. Department of the Interior (PH03308110451)
- CAVINESS, James A. v. U.S. Department of the Army, Soldier Support Center (CH03518010203)
- CHAPPELL, Steven v. Social Security Administration (NY531D8110208)
- COEFIELD, Earlie W. v. United States Government Printing Office (DC07528110599)
- COMPTON, Robert v. Department of Energy (SL03518110160)
- COVINGTON, Sidney L. v. Department of the Interior (DE03518210018)
- CUPIDO, Joseph R., Jr. v. Department of Transportation (DE07528110069)
- CURRY, Tom J., Jr. v. Department of the Treasury (CH315H8210167)
- DALESANDRO, Rachel v. Department of the Navy (NY07528110409)
- DAVIS, Ulysee v. Department of the Navy (DC07528210420)
- DEUTSCH, Stephen v. Department of Defense (SF07528010434)
- DONATICH, Alex v. Department of the Interior (DE03518210019)
- DREHER, David v. United States Postal Service (SF07528110789)
- DUNN, Michael V. v. U.S. Department of Agriculture (DC03178110160)
- ELBER, Martin v. Veterans Administration (SE07528110083)
- ENGLISH, Charles S. v. Office of Personnel Management (RB083190154)
- FULLMER, Ellio L. v. Department of the Army (DE07528110077)
- GOETZ, Phillip R. v. Department of the Interior (DE03518210017)
- HADJIAN, Farrokh v. United States Postal Service (SF07528010117)
- HAMMOND, Jack v. U.S. Postal Service (SF07528111867)
- HANING, Jack M. v. Department of Labor (SE07528110172)
- HERNANDEZ, Gregory v. Department of the Navy (SF07528010455)
- HETTINGER, Robert D. v. Department of the Interior (DE03518210020)
- HOLLIDAY, David C. v. Department of the Army (AT03518110124)
- HOUSTON, Major L. v. United States Postal Service (CH03538110181)
- IGNACIO, Florentina v. Department of the Air Force (SF07528010400)
- IMAZUMI, Alice D. K. v. Department of Health and Human Services (SF315H8110836)
- JACKSON, Deborah E. v. Government of the District of Columbia (DC03518110185)
- JAMES, William, Jr. v. Department of State (DC352C8110752)
- JONES, Howard R. v. Veterans Administration (CH07528110629)
- KING, Cletus, E., Jr. v. Department of the Interior (DE03518210021)
- KONRAD, Agnes G. v. Department of the Treasury (PH07528110228)
- KURTZ, Oscar J. v. Government of the District of Columbia (DC03518010114)
- LANDERS, Eric H. v. Department of Transportation, Federal Aviation Administration (AT075281F2623)
- LEISER, Douglas v. Federal Aviation Administration (AT075282F0119)

LEOPARD, Katherine v. Department of the Navy
(AT07528110733)

LIEBER, Llewellyn L. v. Department of Defense
(SF03518010160)

LOCHREN, Walter v. Department of the Army
(NY07528110236)

MALINAY, Quintin F. v. Office of Personnel Management
(SF08318110862)

MARSHALL, Thomas B. v. U.S. Department of Agriculture
(DC03178110160)

MCBRIARTY, Raymond v. U.S. Department of Agriculture
(NY07528110072)

MCGLADE, Francis S. v. Department of the Army
(DC34438110604)

MCLEOD, Gary v. Department of the Treasury
(SE07528110084)

MEYER, Richard F. v. Department of the Interior
(DE03518210022)

MILES, Anna J. v. Defense Contract Audit Agency
(CH07528110047)

MILLER, Wilbert v. Office of Personnel Management
(DC831L8110780)

MONGEAU, Jean L. v. Government of the District of Columbia
(DC03518010128)

OTHERSON, Jeffrey, L. v. Department of Justice, Immigration and Naturalization Service
(SF07528010172)

PERCIVAL, Donald P. v. Department of the Interior
(DC075209211)

POOL, John M. v. Department of the Army
(PH07528010007)

PROUDIE, Derrell R. v. U.S. Department of the Army
(SL07528210028)

RAMLOGAN, Paul v. Department of Health and Human Services
(DC315H8210348)

REEDER, William R. v. Department of Housing and Urban Development
(AT04328010239)

RESHAW, Ernest M. v. Government of the District of Columbia
(DC03518010116)

ROBB, Bruce P. v. Railroad Retirement Board
(CH07528110211)

ROE, Joseph W. v. Department of Health and Human Services
(CH531D8210059)

ROLLINS, Frederick L. v. U.S. Postal Service
(SL07528010011)

ROYAL, Myrtle A. v. Department of the Air Force
(SF07528110365)

SHEA, Thomas F. v. U.S. Department of Agriculture
(DC03178110160)

SHERMAN, David v. Department of Health and Human Services
(PH531D8110180)

SIMPSON, Ernest v. Department of the Interior
(DE03518210023)

SMITH, Carolyn v. Internal Revenue Service
(BN07528110065)

SNOWDEN, Charles H. v. Department of State
(DC07528110528)

STERNER, Stanley v. Department of the Army
(PH07528110326ADD)

STERNER, Stanley v. Department of the Army
(PH07528110326)

STREICH, Wolfgang K. v. Department of Transportation, Federal Aviation Administration
(AT075282F0449)

THATCHER, Carroll F., Jr. v. Department of the Navy
(DC752S8110659)

THOMAS, Charles E. v. Office of Personnel Management
(PH831L8110215)

THOMAS, Josie W. v. Department of State
(DC07528110249)

TIMMONS, Claxton E. v. Department of the Interior
(DE03518210024)

TRAUNER, Richard J. v. Department of the Army
(SF07528090022ADD)

TUFTS, Galen Henry v. Office of Personnel Management
(AT34438110868)

UPDIKE, Mabel C. v. Government of the District of Columbia
(DC03518010141)

VASQUEZ, Rogelio A. v. Department of Justice
(DA07528110273)

VOGLER, Frederick v. Department of Justice
(DA07528210040)

WARNE, Earl E. v. United States Air Force
(SL07528210051)

WICKFALL, Otis, Jr. v. U.S. Postal Service
(AT07528110264)

WITTENBERG, Jack v. U.S. Postal Service
(SF07528110658)

PETITIONS FOR REVIEW DISMISSED

BLACKBURN, James v. U.S. Postal Service
(SF03538110476)

EVANS, Isaac v. Department of the Army
(AT07528010212)

MOOLENAAR, Gwynneth v. U.S. Department of Justice
(PH531D8010250)

ROBERTS, Kertene C. v. Veterans Administration
(CH07528110569)

SHARPENSTEEN, Leon v. Office of Personnel Management
(DA831L8110144)

AGENCY PETITIONS FOR REVIEW GRANTED

BRACKETT, Morton v. Office of Personnel Management
(BN831L8110006ADD)

HOCKMAN, Robert E. v. American Battle Monuments Commission
(SF07528110757)

LYON, Lynn L. v. Office of Personnel Management
(SF831L8110394ADD)

SCARBOROUGH, William E. v. Office of Personnel Management
(AT831L8010211)

ADDENDUM DECISION AFFIRMED AS MODIFIED

LANGENBACH, John v. U.S. Postal Service
(NY07528090142ADD)

INITIAL DECISIONS AFFIRMED OR AFFIRMED AS MODIFIED

ABRAMS, James v. Department of the Navy (PH07528110312)
CLARK, Kenneth L. v. Department of the Navy (SE075209073ADD)
COGMAN, Sandra L. v. Defense Logistics Agency (CH07528110162)
DIEFENBACH, Willard Edward v. Government of the District of Columbia (DC03518110441)
DONALDSON, Charles O., Jr. v. United States Postal Service (SF07527990061)
GALLEGO, Edward v. Department of the Navy (SF07528110759)
GIBSON, Robert, Jr. v. Department of Justice (NY07528090116ADD)
GOODMAN, James E. v. U.S. Department of Agriculture (PH07528010342)
GRAY, James H. v. Department of the Army (DC07528110184)
GREWE, Harold H. v. Office of Personnel Management (CH831L8110167)
HOLLOMAN, Ruppert v. Veterans Administration (NY07528010145)
JOHNSON, Clarence v. U.S. Postal Service (NY07528110054)
MARCHAND, Thomas E. v. Equal Employment Opportunity Commission (SF07528110665)
MORROW, Helene T. v. Department of the Army (DA07528090245ADD)
NOVAK, Steven C. v. Department of the Treasury (DC07528010180)
PLATH, Jay v. Department of Justice (BN07528110071)
PLETTEN, Leroy J. v. Department of the Army (CH07528110619)
RATKUS, Loretta v. General Services Administration (BN03518110064)
REAVES, James W. v. Department of the Navy (SF07528010422)
ROBELIA, James v. U.S. Postal Service (CH07528110098)
SCHERER, Charles P. v. Department of the Treasury (DC075209226)
SOLGA, Joseph J., Jr. v. Department of the Army (PH07528110072)
WALKER, Ellis, Jr. v. Veterans Administration (DC07528090232)
WARE, Jonnie v. Department of Education (SF07528010323)

INITIAL DECISIONS REVERSED

COULTER, William E. v. Department of the Navy (SF07528010418)
PARRISH, Willie, III v. United States Postal Service (AT07528110055)

SCHARF, Harvey M. v. Department of the Air Force (SF752B8110009)
SHULTZ, H. Dean v. Department of the Interior (DC03518110119)
SIMMS, Virgil A. v. Government of the District of Columbia (DC03518010131)
SKRAM, Michael A. v. United States Postal Service (SF07528111232)
WRIGHT, Maurice E. v. Federal Aviation Administration (DC07528010413)

INITIAL DECISION MODIFIED IN PART AND REVERSED AS TO ULTIMATE OUTCOME

SORRELLS, Donald v. Veterans Administration (CH075209200)

CASES REMANDED TO REGIONAL OFFICES

BROWN, Raymond W., et al. v. Department of Defense (DC075209174)
COPELAND, Frank W. v. Office of Personnel Management (AT831L8110031)
KHALSA, Sat Kartar Singh v. Department of the Treasury (DC315H8110163)
LAND, Dwight L. v. Federal Aviation Administration (CH07528110154)
MORGANTI, Peter v. Department of Health and Human Services (NY531D8110127)
ROBERTS, Jim L. v. United States Postal Service (DA07528110515)
WADE, Weldon L. v. U.S. Department of Justice (SL075209061)

CASES REOPENED BY THE BOARD

KINSEY, Robert Lee v. U.S. Postal Service (SF07528110566)

APPEALS DISMISSED

ALDRIDGE, E. Gray v. Veterans Administration (SL07528110067)
MILLER, Daniel J. v. Department of the Army (PH07528110165)
PHILLIPS, Gerald W. v. Department of Transportation, Federal Aviation Administration (DE03538110240)
SMITH, Beatrice E. v. Department of Health and Human Services (PH07528110399)
WINDOM, Wyatt E. v. Department of the Navy (SF03518010522)

JOINT MOTION TO DISMISS GRANTED

SPECIAL COUNSEL v. Small Business Administration (HQ12068110006)

AGENCY MOTION FOR STAY DENIED

MAXFIELD, Alan M. v. Department of Transportation (DE07528110038)

**REINSTATEMENT ORDERED BY U.S. COURT OF
APPEALS**

RAICOVICH, John v. U.S. Postal Service
(AT035309005)

**CASES ASSIGNED TO ADMINISTRATIVE LAW
JUDGES**

NICCHITTA, Angelo G., Appellant, v. Interstate
Commerce Commission, Respondent
(DC03518211279)

SHARER, Ralph C., Jr. v. National Aeronautics and
Space Administration (DC07528211359)

SPECIAL COUNSEL v. Gary D. Morgan
(HQ12068210028)

SPECIAL COUNSEL v. Henry P. West
(HQ12068210030)

SPECIAL COUNSEL v. Bobby Gene Willett
(HQ12068210027)

SPECIAL COUNSEL v. John R. Winfield
(HQ12068210029)

**REQUEST FOR EXTENSION OF TIME
GRANTED**

SEVEN JOHN DOES v. Office of Personnel Manage-
ment (DA08318110337) and (DC08318110596)

ERRATA

COMPTON, Robert v. Department of Energy
(SL03518110160)

KHALSA, Sat Kartar Singh v. Department of the
Treasury (DC315H8110163)

MAY, Joseph M. v. Interstate Commerce Commission
(DC03518211267)

MCLEOD, Gary v. Department of the Treasury
(SE07528110084)

WINDOM, Wyatt E. v. Department of the Navy
(SF03518010522)

INDEX

NOTES ON KEY NUMBERS

Summarized Board orders are indexed according to the key number system used in the published volumes, *Decisions of the United States Merit Systems Protection Board*. The index numbers listed after each caption show the subjects found in the decision. In the published volumes, the indexes will include citations of the decisions under the same numbers allotted to them here. There are 18 main subject areas. These are described under Major Topics and Scope Notes. The Outline of Topics divides each major topic into more specific subtopics.

MAJOR TOPICS AND SCOPE NOTES

Topic

1.000000 ADVERSE ACTIONS

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure* (10.000000), and opinions relating to jurisdictional matters have been placed under *Jurisdiction* (6.000000). Cases regarding remedies available to the Board in adverse action cases are located in *Remedies* (14.000000).

2.000000 CONSTITUTIONALITY

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination* (3.000000).

3.000000 DISCRIMINATION

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included

are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure and remedial action in discrimination cases are referenced in *Evidence* (4.000000), *Jurisdiction* (6.000000), *Practice and Procedure* (10.000000), and *Remedies* (14.000000), respectively.

4.000000 EVIDENCE

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

This topic references Board cases relating to the Freedom of Information, Privacy, and Sunshine Acts.

6.000000 JURISDICTION

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement* (15.000000).

7.000000 LABOR-MANAGEMENT RELATIONS

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were ger-

mane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

9.000000 PERFORMANCE RELATED ACTIONS

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems have not yet been implemented.

10.000000 PRACTICE AND PROCEDURE

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

11.000000 PROHIBITED PERSONNEL PRACTICES

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

12.000000 REDUCTIONS IN FORCE

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

13.000000 REGULATION REVIEW

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Of-

fice of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

14.000000 REMEDIES

This topic references Board cases dealing with the remedial powers of the Board.

15.000000 RETIREMENT

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

16.000000 SPECIAL COUNSEL

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedules Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure* (10.000000).

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

This topic references cases dealing with issues of suitability. Included also are cases involving fitness-for-duty examinations.

18.000000 EMPLOYMENT PRACTICES

This topic references cases concerning the substantive law governing employment practices and distinguishes employment restrictions that are not appealable employment practices.

OUTLINE OF TOPICS

(With Key Numbers)

1.000000 Adverse Actions

1.100 ACTIONS CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

- 1.110 Removal**
- 1.111 Involuntary Resignation or Retirement
- 1.120 Suspension for more than 14 days**
- 1.121 Enforced Leave
- 1.130 Reduction in Grade**
- 1.131 Involuntary Demotion
- 1.140 Reduction in Pay**
- 1.150 Furlough of 30 days or less**
- 1.160 Adverse Action by Office of Personnel Management**

1.200 ACTIONS NOT CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

- 1.210 Suspension for less than 14 days**
- 1.220 Letter of Reprimand**
- 1.230 Actions Based on Unacceptable Performance**
- 1.231 Denial of Within-Grade Step Increase
- 1.232 Reduction in Grade
- 1.233 Removal
- 1.240 Reduction in Force**
- 1.250 Reduction in Rank**

1.300 SUBSTANTIVE CHARGES

- 1.310 Attendance Related**
- 1.311 Absence Without Leave
- 1.312 Abuse of Leave
- 1.313 Tardiness
- 1.314 Efficiency of the Service—Attendance
- 1.320 Alcohol and Drug Related**
- 1.321 On-Duty Conduct
- 1.322 Off-Duty Conduct
- 1.330 Criminal Conduct**
- 1.331 On-Duty Conduct
- 1.3311 Criminal Charges
- 1.3312 Criminal Conviction
- 1.332 Off-Duty Conduct
- 1.3321 Criminal Charges
- 1.3322 Criminal Conviction
- 1.340 Dishonest Work Related Conduct**
- 1.341 Bribery
- 1.342 Embezzlement
- 1.343 Falsification
- 1.3431 Medical Record
- 1.3432 Employment Applications
- 1.3433 Time and Work Records
- 1.344 Fraud
- 1.345 Misappropriation and/or Misuse of Government Property
- 1.346 Malfeasance in Office
- 1.350 Prohibited Political Activity**
- 1.360 Other Work Related Charges**
- 1.361 Abuse of Authority
- 1.3611 Sexual Harrassment
- 1.3612 Prohibited Discrimination
- 1.362 Conflict of Interest
- 1.363 Insubordination
- 1.3631 Refusal to Accept Reassignment
- 1.364 Gross Waste
- 1.365 Creation of Danger to Public Health and Safety
- 1.366 Insolence
- 1.367 Violence
- 1.368 Unauthorized Activities

1.369 "Failure to" Charges
1.370 **Charges Related to Off-Duty Conduct**
1.371 Efficiency of the Service
1.3711 Nexus
1.380 **Classification and Qualifications Requirements**
1.390 **Performance Related**

1.400 BOARD CONSIDERATION OF PENALTIES

1.410 **Mitigation of Penalty**
1.420 **Prior Disciplinary Record**
1.430 **Disparate Treatment of Similarly Situated Employees**

1.500 PROCEDURAL RIGHTS IN ADVERSE ACTIONS

1.510 **Notice**
1.511 Crime Provision
1.512 Emergency Suspension During Notice Period
1.513 Reasons
1.520 **Reply**
1.521 Written Reply
1.522 Oral Reply
1.530 **Review of Materials on Which Action Based**
1.540 **Right to Representation**
1.550 **Proposing and Deciding Official**
1.560 **Appeal to Merit Systems Protection Board**
1.561 Burden of Proof
1.562 Efficiency of the Service—Generally
1.570 **Decision**

1.600 DEFENSE

1.610 **Stale Charges**
1.620 **Mental Conditions**
1.630 **Animus**
1.640 **Coercion**

2.000000 Constitutionality

2.100 DUE PROCESS

2.110 **Liberty Rights or Interest**
2.120 **Property Rights or Interest**
2.130 **Requisite Administrative Procedures**

2.200 CRIMINAL CONSTITUTIONAL CONSIDERATIONS

2.210 **Self-Incrimination**
2.220 **Right to Counsel**
2.230 **Double Jeopardy**

2.300 FIRST AMENDMENT FREEDOMS

2.310 **Freedom of Speech**
2.311 Relation of Efficiency of the Service
2.3111 Defamation
2.312 Balancing Test
2.313 Mixed Motive
2.320 **Freedom of Religion**
2.321 Relation of Efficiency of the Service
2.3211 Free Exercise
2.3212 Establishment

2.400 RIGHT TO PRIVACY

3.000000 Discrimination

3.100 PROHIBITED DISCRIMINATION

- 3.110 Age Discrimination**
- 3.111 Age Discrimination in Employment Act of 1967, 29 U.S.C. 631, 633a
- 3.120 Race, Color, and National Origin Discrimination**
- 3.121 Civil Rights Act of 1964, 42 U.S.C. 2000e-16
- 3.130 Handicap Discrimination**
- 3.131 Handicapping Condition
- 3.1311 Physical Disability
- 3.1312 Mental Disability
- 3.1313 Alcoholism and Drug Abuse
- 3.132 Rehabilitation Act of 1973, 29 U.S.C. 791
- 3.1321 Reasonable Accommodation
- 3.13211 Undue Hardship
- 3.1322 Rehabilitation
- 3.133 Qualified Handicapped Employee
- 3.140 Sex Discrimination**
- 3.141 Civil Rights Act of 1964, 42 U.S.C. 2000e-16
- 3.142 Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)
- 3.143 Sexual Preference
- 3.144 Sexual Harassment
- 3.150 Religious Discrimination**
- 3.151 Civil Rights Act of 1964, 42 U.S.C. 2000e-16
- 3.160 Marital Status Discrimination**
- 3.170 Discrimination on the Basis of Political Affiliation**

3.200 DISPARATE TREATMENT OF SIMILARLY SITUATED EMPLOYEES

3.300 AFFIRMATIVE ACTION

- 3.310 Minorities**
- 3.320 Handicapped Persons**
- 3.330 Women**

3.400 BURDENS OF PROOF

- 3.410 Prima Facie Case**
- 3.420 Legitimate Non-discriminatory Reason**
- 3.430 Pretext**

4.000000 Evidence

4.100 ADMISSIBILITY

- 4.110 Prehearing Evidence**
- 4.111 Admissions
- 4.112 Affidavits
- 4.113 Evidence Obtained Through Discovery
- 4.1131 Depositions
- 4.1132 Interrogatories
- 4.1133 Documents
- 4.114 Best Evidence
- 4.115 Polygraphs
- 4.116 Handwriting
- 4.120 Testimony**
- 4.121 Relevancy
- 4.122 Materiality
- 4.123 Privileged Matter
- 4.124 Hearsay
- 4.125 Credibility
- 4.126 Perjury
- 4.127 Probative Value
- 4.128 Circumstantial Evidence
- 4.129 Opinion

4.130 Official Notice
 4.131 Facts
 4.132 Documents
4.140 Evidence of Prior Disciplinary Actions
4.150 Stipulations

4.200 BURDENS OF PROOF

4.210 Preponderance of the Evidence
 4.211 Agency Burden
 4.212 Appellant's Burden
4.220 Substantial Evidence
4.230 Arbitrary, Capricious, or Abuse of Discretion
4.240 Reasonable Grounds to Believe
4.250 Burden of Persuasion
4.260 Burden of Going Forward

4.300 HARMFUL ERROR

4.310 Agency Procedures
4.320 Presiding Official's Rulings

5.000000 FOI, Privacy, and Sunshine Acts

5.100 SUNSHINE ACT

5.200 FREEDOM OF INFORMATION ACT

5.210 Exemptions
 5.211 Internal Personnel Rules and Practices
 5.212 Statutory Exemptions
 5.213 Inter- and Intra-Agency Memoranda and Letters
 5.214 Personnel and Medical Files

5.300 PRIVACY ACT

5.310 Form of Request
5.320 Denial of Access
 5.321 Appeal Rights

6.000000 Jurisdiction

6.100 MERIT SYSTEMS PROTECTION BOARD JURISDICTION

6.110 Original Jurisdiction
 6.111 Special Counsel Cases
 6.112 Senior Executive Service Removals
 6.113 Employee Disciplinary Actions under the Federal Employee Flexible and Compressed Work Schedules Act
 6.114 Administrative Law Judges
6.120 Appellate Jurisdiction
 6.121 Adverse Actions
 6.122 Denial of Within-Grade Step Increases
 6.123 Senior Executive Service Cases
 6.124 Discrimination Cases
 6.1241 Equal Employment Opportunity Commission
 6.1242 Mixed Cases
 6.1243 Special Panel
 6.125 Non-Appealable Actions
 6.1251 Position Classification
 6.1252 Promotion
 6.1253 Performance Ratings
 6.1254 Reassignment
 6.1255 Reinstatement
 6.1256 Reprisal
 6.1257 Miscellaneous
 6.1258 Grievance Decisions
 6.126 Agency Regulations
 6.127 Prohibited Personnel Practices
 6.128 Review of Grievance Decision

6.200 PARTICULAR PARTIES

- 6.210 **Independent Agencies**
- 6.220 **Independent Establishments**
- 6.230 **Intelligence Agencies**
- 6.240 **Government Corporations**

6.300 PRESIDING OFFICIAL'S JURISDICTION

- 6.310 **Generally**
- 6.320 **Finality of Decisions**
- 6.330 **Appeals of Presiding Official Decisions**

6.400 OFFICE OF PERSONNEL MANAGEMENT

- 6.410 **Intervention**
- 6.420 **Rules and Regulations**

6.500 ENFORCEMENT

- 6.510 **Petitions**
- 6.511 Appellate Cases
- 6.512 Original Cases
- 6.520 **Compliance**
- 6.530 **Comptroller General**

6.600 EXHAUSTION OF REMEDIES

6.700 JUSTICIABILITY

- 6.710 **Mootness**
- 6.720 **Ripeness**
- 6.730 **Real Party in Interest**
- 6.740 **Case or Controversy**

6.800 SAVINGS PROVISION (5 U.S.C. 1101 note)

6.900 STATUTORY CONSTRUCTION OF THE CIVIL SERVICE REFORM ACT OF 1978

7.000000 Labor-Management Relations

7.100 GRIEVANCE PROCEDURES

- 7.110 **Negotiated Grievance Procedures in Collective Bargaining Agreements**
- 7.111 Exclusion of Specific Matters from Negotiated Grievance Procedures
- 7.112 Arbitration
- 7.113 Prohibited Personnel Practices
- 7.1131 Election of Statutory or Negotiated Procedure
- 7.1132 Right to Request Merit Systems Protection Board Review
- 7.114 Actions Based on Unacceptable Performance
- 7.1141 Election of Statutory or Negotiated Procedure
- 7.1142 Arbitrator governed by U.S.C. 7701(c)(1)
- 7.1143 Judicial Review of Arbitrator's Award
- 7.115 Adverse Actions
- 7.1151 Election of Statutory or Negotiated Procedure
- 7.1152 Arbitrator governed by 5 U.S.C. 7701(a)(1)
- 7.1153 Judicial Review of Arbitrator's Award

7.200 FEDERAL LABOR RELATIONS AUTHORITY

7.300 UNFAIR LABOR PRACTICES

- 7.310 **Agency Unfair Labor Practices**
- 7.311 Interference with Exercise of Employee's Rights
- 7.312 Discrimination on the Basis of Union Membership
- 7.313 Sponsorship, Control or Undue Assistance to Labor Organization
- 7.314 Reprisal for Filing of Complaint

7.315	Failure to Negotiate in Good Faith with a Labor Organization
7.3151	Compelling Need
7.3152	Duty to Consult
7.316	Failure to Cooperate in Impasse Procedures and Decisions
7.3161	Federal Service Impasses Panel
7.317	Enforcement of Rules and Regulations in Conflict with Prior Collective Bargaining Agreement
7.3171	Prohibited Personnel Practices Exception
7.318	Failure to Comply with any Provisions of Title 5, Chapter 71
7.320	Labor Organization Unfair Labor Practices
7.321	Interference with Exercise of Employee's Rights
7.322	Cause or Attempt to Cause Agency Discrimination Against Employee in the Exercise of Employee's Rights
7.323	Coercion of Union Members with Regard to Discharge of Employee Work Duties
7.324	Discrimination Against Employees with Regard to Membership
7.3241	Race or Color
7.3242	Creed
7.3243	National Origin
7.3244	Sex
7.3245	Age
7.3246	Preferential Civil Service Status
7.3247	Political Affiliation
7.3248	Marital Status
7.3249	Handicapping Condition
7.325	Failure to Negotiate in Good Faith with Agency
7.3251	Compelling Need
7.3252	Duty to Consult
7.326	Failure to Cooperate in Impasse Procedures and Decisions
7.3261	Federal Service Impasses Panel
7.327	Call for or Participation in Strike, Work Stoppage, Slowdown, or Disruptive Picketing
7.3271	Failure to Take Action to Prevent or Stop
7.328	Failure to Comply with any Provision of Title 5, Chapter 71

7.400 COLLECTIVE BARGAINING AGREEMENTS

7.410	Enforcement of Provisions
7.420	Right of Representation
7.430	Interpretation of Provisions

8.000000 Particular Employment Categories

8.100 ADMINISTRATIVE LAW JUDGES

8.110	Original Jurisdiction Action
8.111	Removal
8.112	Suspension
8.113	Reduction in Grade
8.114	Reduction in Pay
8.115	Furlough of 30 days or less
8.120	Good Cause
8.121	Conduct and Demeanor/Judicial Temperament
8.122	Bias

8.200 PARTICULAR FEDERAL ENTITIES

8.210	United States Postal Service
8.211	Preference Eligibles
8.212	90 Day Probationary Period
8.213	Alcohol Rehabilitation Program
8.220	Postal Rate Commission
8.230	Law Enforcement Personnel
8.231	Federal Bureau of Investigation
8.240	Intelligence Agencies
8.250	General Accounting Office
8.260	Non-Appropriated Fund Activities
8.270	Government Corporations
8.280	National Guard and Air Force

8.300 SPECIAL SITUATIONS

8.310	Applicants
8.320	Probationary Employees
8.321	Post-appointment Reasons
8.3211	Determining Completion of Probation
8.3212	Absent Allegation of Partisan Political or Marital Status Discrimination
8.3213	Allegations of Handicap Discrimination
8.3214	Allegations of Race Discrimination
8.3215	Allegations of Religious Discrimination
8.3216	Allegation of Sex Discrimination
8.3217	Allegations of Prohibited Personnel Practices
8.3218	Marital Status
8.3219	Partisan Politics
8.322	Pre-appointment Reasons
8.3221	Procedures
8.323	Supervisory or Managerial Probationary Periods
8.324	Resignations During Probationary Period
8.330	Excepted Service
8.331	One Year of Current Continuous Service
8.332	Pre-appointment Reasons
8.333	Same or Similar Positions
8.334	Handicapped Appointments
8.340	Preference Eligible Employees
8.341	Veterans
8.3411	Veterans Readjustment Appointees
8.350	Confidential Employees
8.360	Overseas Personnel
8.370	Employees of District of Columbia
8.380	State and Local Employees
8.390	Part-Time and Temporary Employees

8.400 EMPLOYEES HAVING RESTORATION TO DUTY RIGHTS

8.410	Military Duty
8.420	Employment Related Injuries
8.421	Fully Recovered Employee

8.500 SENIOR EXECUTIVE SERVICE

8.510	Types of Positions
8.511	Career Appointee
8.512	Noncareer Appointee
8.513	Limited Term Appointee
8.514	Limited Emergency Appointee
8.515	General Position
8.520	Actions Within the Senior Executive Service
8.521	Reassignment
8.522	Transfer
8.530	Appealable Actions
8.531	Removals
8.5311	Procedural Requirements
8.5312	Efficiency of the Service
8.53121	Nexus
8.532	Suspensions for more than 14 Days
8.5321	Procedural Requirements
8.5322	Efficiency of the Service
8.53221	Nexus
8.533	Conversion of Position to Senior Executive Service
8.540	Performance Appraisal
8.550	Removal from Senior Executive Service
8.551	Hearing

8.600 MERIT PAY

8.610	Transfer of Position to Merit Pay Status
--------------	---

9.000000 Performance Related Actions

9.100 ACTIONS BASED ON PERFORMANCE

- 9.110 Denial of Within-Grade Increase**
- 9.120 Reduction in Grade**
- 9.130 Removal**
- 9.140 Reassignment**
- 9.150 Promotion**

9.200 PERFORMANCE APPRAISAL SYSTEMS

- 9.210 Establishment of Performance Appraisal Systems**
- 9.211 Periodic Appraisals of Performance
- 9.212 Employee Participation in Establishment of Performance Standards
- 9.213 Communication of Performance Standards and Critical Elements to Employees
- 9.214 Employee Performance Evaluation
- 9.2141 Acceptable Level of Competence Determinations
- 9.2142 Recognition and Awards
- 9.2143 Assistance in Improving Performance
- 9.2144 Opportunity to Demonstrate Acceptable Performance
- 9.220 Review of Performance Appraisal Systems by the Office of Personnel Management**

9.300 PROCEDURAL RIGHTS IN ACTIONS BASED ON UNACCEPTABLE PERFORMANCE

- 9.310 Reduction in Grade or Removals**
- 9.311 Notice
- 9.3111 Instances of Unacceptable Performance
- 9.3112 Critical Elements Involved
- 9.3113 Timeliness
- 9.312 Representation
- 9.313 Response
- 9.3131 Oral Response
- 9.3132 Written Response
- 9.314 Written Decision
- 9.3141 Specifications of Unacceptable Performance
- 9.3142 Concurrence of Higher Position Employee
- 9.3143 Timeliness
- 9.315 Deletion of Notice from Agency Record
- 9.3151 Performance Acceptability for One Year
- 9.316 Appeal Rights
- 9.320 Denial of Within Grade Increase**
- 9.321 Notice
- 9.322 Written Decision
- 9.323 Timeliness
- 9.324 Reconsideration by Agency
- 9.3241 Written Decision
- 9.3242 Higher Level Employee
- 9.32421 No Participation in Original Decision
- 9.325 Appeal Rights
- 9.330 Burden of Proof**
- 9.331 Substantial Evidence
- 9.332 Preponderance of the Evidence—Chapter 75
- 9.3321 Efficiency of the Service
- 9.33211 Nexus

10.000000 Practice and Procedure

10.100 APPELLATE JURISDICTION

- 10.110 Prehearing Procedures**
- 10.111 Filing of Appeal and Request for Hearing
- 10.1111 Right to Hearing
- 10.1112 Waiver of Right to Hearing
- 10.1113 Withdrawal of Appeal
- 10.112 Agency Response
- 10.1121 Agency Request for or Appearance at Hearing
- 10.113 Class Action

10.114	Consolidation and Joinder
10.115	Intervention
10.1151	Intervention as a Matter of Right
10.1152	Permissive Intervention
10.116	Discovery Procedures
10.1161	Motion for Discovery
10.11611	Interrogatories
10.11612	Deposition
10.11613	Production of Documents
10.117	Prehearing Conference
10.118	Subpoenas
10.119	Request for Witnesses
10.120	Presiding Official
10.121	Duties and Powers
10.1211	Discretion
10.12111	Dismissals
10.12112	Failure to Prosecute
10.1212	Ruling on Motions
10.12121	Venue
10.12122	Interlocutory Appeals
10.1213	Orders of Presiding Officials
10.12131	Compliance
10.1214	Decision
10.12141	Content
10.12142	Effective Date
10.12143	Finality
10.12144	Summary Decision
10.12145	Recommended Decision
10.12146	Form
10.1215	Hearings
10.12151	Postponement
10.1216	Closing the Record
10.1217	Service
10.122	Bias
10.123	Disqualification
10.124	Amicus Briefs
10.130	Board Review of Initial Decision
10.131	Board Reopening
10.132	Petition for Review
10.1321	Filing Requirements
10.1322	Criteria
10.133	Board Review Powers
10.140	Board Opinion
10.141	Content
10.142	Effective Date
10.143	Finality
10.144	Reconsideration
10.150	Judicial Review

10.200 ORIGINAL JURISDICTION

10.210	Special Counsel Cases
10.211	Complaints for Corrective Action
10.2111	Filing of Complaint
10.2112	Rights of Employees in 5 U.S.C. 1206(g) Disciplinary Actions
10.21121	Answer
10.21122	Representation
10.21123	Hearing
10.2113	Party Response Rights
10.2114	Powers of Board
10.2115	Board Decision
10.2116	Judicial Review
10.212	Stays
10.2121	Initial Stay—Section 1208(a)
10.21211	Filing of Request for Stay
10.2122	Extension of Initial Stay—Section 1208(b)
10.21221	Filing of Request for Extension of Stay
10.21222	Agency Response

10.2123	Indefinite Stay—Section 1208(c)
10.21231	Filing of Request for Indefinite Stay
10.21232	Opportunity for Comment
10.212321	Special Counsel
10.212322	Agency
10.2124	Powers of Board
10.21241	Initial Stay
10.21242	Extension of Initial Stay
10.21243	Indefinite Stay
10.2125	Board Decision
10.2126	Judicial Review
10.213	Hatch Act Procedures
10.2131	Filing of Letter of Charges
10.2132	Response Rights
10.2133	Powers of Board
10.2134	Board Decision
10.2135	Judicial Review
10.214	Intervention
10.2141	Office of Personnel Management
10.2142	Others
10.220	Administrative Law Judge Cases
10.221	Filing of Complaint
10.222	ALJ Response
10.223	Procedural Rights (cross-reference to 10.110)
10.224	Presiding Official
10.2241	Administrative Law Judge
10.2242	Merit Systems Protection Board
10.225	Powers of Board
10.226	Decision
10.2261	Recommended Decision
10.227	Judicial Review
10.230	Review of Rules and Regulations
10.231	Office of Personnel Management

10.300 CASES HEARD BY ADMINISTRATIVE LAW JUDGES

10.400 REPRESENTATION

10.410	Pro Se
10.420	Attorney
10.430	Other Representation
10.440	Conflict of Interest

10.500 EX PARTE CONDUCT

10.600 SUBSTITUTION OF PARTIES

10.610	Death of Appellant
---------------	---------------------------

10.700 FORMER ADJUDICATION

10.710	Res Judicata
10.720	Estoppel

10.800 GENERAL BOARD POWERS

10.810	Waiver of Board Regulations
10.811	Untimeliness
10.820	Waiver of Non-Statutory Requirements in Board Orders

11.000000 Prohibited Personnel Practices

11.000 PRACTICES PROHIBITED

11.110	Personal Favoritism
11.111	Improper Consideration of Employee Information
11.112	Willful Deception or Obstruction of Competition
11.113	Forced Withdrawal from Competition
11.114	Unauthorized Employment Preferences

11.115	Nepotism
11.120	Unauthorized Political Practices
11.121	Political Coercion
11.122	Political Reprisals
11.130	Prohibited Discrimination
11.131	Age
11.132	Race/Color and National Origin
11.133	Handicapping Condition
11.134	Sex
11.135	Religion
11.136	Marital Status
11.137	Political Affiliation
11.140	Prohibited Reprisals
11.141	For Exercising Appeal Rights
11.150	Whistleblowers
11.151	Actions against Whistleblowers
11.1511	Definition of Gross Waste of Funds
11.1512	Definition of Mismanagement
11.1513	Definition of Abuse of Authority
11.152	Reprisals Against Whistleblowers
11.160	Actions Based on Non-Performance Related Conduct
11.161	Nexus to Efficiency of the Service
11.170	Actions in Violation of Merit Systems Principles
11.171	Merit Systems Principles
11.172	Implementation of Merit Systems Principles

11.200 BURDENS OF PROOF

11.210	Definition of Personnel Action
11.220	Authority to Take Action

12.000000 Reductions in Force

12.100 ACTIONS

12.110	Assignment
12.111	Change of Positions or Reclassification
12.112	Grade Retention
12.113	Pay Retention
12.114	Retreat Rights
12.115	Remedial Actions
12.116	Best Offer
12.120	Furlough
12.130	Separation

12.200 RETENTION STANDING

12.210	Competitive Area
12.220	Competitive Level
12.230	Retention Register
12.231	Tenure of Employment
12.232	Veteran Preference
12.233	Performance Ratings

12.300 TRANSFER OF FUNCTIONS

12.310	Transfer of Employees
---------------	------------------------------

12.400 PROCEDURAL RIGHTS AND REQUIREMENTS

12.410	Notice
12.411	General
12.412	Specific
12.420	Appeals
12.421	Burden of Proof
12.422	Premature RIF Appeal
12.430	Restoration by Agency
12.440	Reemployment Priority List

12.500 JUSTIFICATION

12.510	Lack of Work
12.511	Contracting Out
12.520	Shortage of Funds
12.530	Reorganization
12.531	Invalid Reorganization
12.540	Reclassification
12.550	Exercise of Reemployment or Restoration Rights
12.560	Challenges to Bona Fides
12.561	Personal Reasons
12.562	Job Conditions

13.000000 Regulation Review

13.100 OFFICE OF PERSONNEL MANAGEMENT RULES AND REGULATIONS

13.110	Facial Invalidity
13.120	Agency Implementation

14.000000 Remedies

14.100 REINSTATEMENT

14.110	Backpay
---------------	----------------

14.200 CIVIL PENALTY

14.210	Damages
---------------	----------------

14.300 CEASE AND DESIST ORDER

14.400 CORRECTIVE ACTION

14.500 ATTORNEY FEES

14.510	Statutory Authorization
14.520	Interest of Justice
14.521	Prohibited Personnel Practice
14.522	Clearly Without Merit
14.523	Bad Faith
14.5231	Harassment
14.5232	Improper Pressure
14.524	Gross Procedural Error by Agency
14.525	Agency Direct or Indirect Knowledge of Lack of Merit
14.530	Prevailing Party
14.540	Incurred
14.541	Attorney-Client Relationship
14.550	Reasonableness of Fees
14.560	Timeliness of Fee Motion

14.600 SETTLEMENT

14.700 MITIGATION OF PENALTY

15.000000 Retirement

15.100 RETIREMENT REQUIREMENTS

15.110	Early Retirement
15.111	Reorganization, Reduction in Force, Transfer of Function
15.120	Credit for Service
15.121	Law Enforcement Officers and Firefighters
15.122	Covered Position
15.130	Disability Retirement
15.131	On Application of Employee
15.1311	Appeal to Merit Systems Protection Board

- 15.13111 Scope of Review
- 15.13112 Burden of Proof
- 15.132 On Application of Agency
- 15.1321 Appeal to Merit Systems Protection Board
- 15.13211 Scope of Review
- 15.13212 Burden of Proof
- 15.1322 Remand to Office of Personnel Management
- 15.133 Physical or Mental Condition
- 15.1331 Type of Evidence
- 15.134 Impact on Performance, Attendance and Conduct
- 15.135 Total Disability
- 15.136 Agency Obligation to Accommodate
- 15.1361 Reassignment
- 15.137 Re-examination and Recovery
- 15.138 Five-year Service Requirement
- 15.140 Mandatory Separation**
- 15.141 Law Enforcement Officers and Firefighters
- 15.142 Air Traffic Controllers
- 15.150 Retirement Contributions**
- 15.160 Optional Retirement**

15.200 ANNUITIES

- 15.210 Determinations of Annuities**
- 15.2101 Effects of Federal Employee's Compensation Act Payments
- 15.2102 Forfeiture
- 15.220 Recovery of Annuity Overpayments**
- 15.230 Appeal to MSPB by Annuitant**
- 15.240 Survivor Annuities**

15.300 INVOLUNTARY RETIREMENT

15.400 JURISDICTION

- 15.410 Administrative Action or Order**

16.000000 Special Counsel

16.100 INVESTIGATORY AUTHORITY

- 16.110 Investigation of Prohibited Personnel Practices**
- 16.120 Investigation of Whistleblower Allegations**
- 16.130 Investigation of Political Activities**
- 16.131 Hatch Act Violations
- 16.1311 Federal Employees
- 16.1312 District of Columbia Employees
- 16.1313 State and Local Employees
- 16.140 Investigation of Information Withholding**
- 16.150 Investigation of Civil Service Violations**

16.200 PROSECUTION

- 16.210 Referral to Agency Heads**
- 16.211 Administrative Appeals Procedures
- 16.212 Reports
- 16.213 Settlement
- 16.214 Non-Duplication Policy
- 16.220 Corrective Action**
- 16.221 Reasonable Grounds to Believe
- 16.222 Requests to Order Corrective Action
- 16.230 Stays**
- 16.231 Reasonable Grounds
- 16.232 Burden of Proof
- 16.2321 Section 1208(a)—15 days
- 16.2322 Section 1208(b)—30 days
- 16.2323 Section 1208(c)—Indefinite
- 16.240 Intervention Before Merit Systems Protection Board**

- 16.250** **Disciplinary Actions Against Employees**
- 16.251 Arbitrary and Capricious Withholding
- 16.252 Financial Privacy Violations
- 16.253 Hatch Act Violations
- 16.2531 Federal Employees
- 16.2532 District of Columbia Employees
- 16.2533 State and Local Employees
- 16.254 Prohibited Personnel Practices
- 16.255 Federal Employee Flexible and Compressed Work Schedules Act Violation

16.300 FILING OF COMPLAINTS BEFORE SPECIAL COUNSEL

- 16.310** **Place of Filing**
- 16.320** **Form and Contents**
- 16.330** **Withdrawals**
- 16.340** **Protection of Complainant's Identity**

17.000000 Suitability and Fitness for Duty Examination

17.100 CRITERIA CONSIDERED IN SUITABILITY DETERMINATION

- 17.110** **Delinquency or Misconduct in Prior Employment**
- 17.120** **Criminal, Dishonest, Infamous, or Notoriously Disgraceful Conduct**
- 17.130** **Falsification or Fraud**
- 17.140** **Alcoholism**
- 17.150** **Drug Abuse**
- 17.160** **Loyalty**
- 17.170** **Statutory Disqualifications**
- 17.180** **Additional Factors**
- 17.181 Nature of Position
- 17.182 Nature and Seriousness of Conduct
- 17.183 Circumstances Surrounding Conduct
- 17.184 Recency of Conduct
- 17.185 Age of Applicant or Appointee at Time of Conduct
- 17.186 Contributing Social or Environmental Conditions
- 17.187 Rehabilitation Efforts

17.200 STANDARD APPLIED IN SUITABILITY DETERMINATION

- 17.210** **Efficiency of the Service**
- 17.211 Nexus

17.300 CONSEQUENCES OF NEGATIVE SUITABILITY DETERMINATION

- 17.310** **Disqualification**
- 17.320** **Removal**
- 17.330** **Debarment**

17.400 FITNESS FOR DUTY EXAMINATION

- 17.410** **Psychiatric Exam**
- 17.420** **Physical Exam**

18.000000 Employment Practices

FOR YOUR INFORMATION

DIGEST

The DIGEST is a monthly publication containing summaries of Board orders and a list of other Board orders and issuances. It is available from the Superintendent of Documents on either a subscription or single issue basis. The price for a subscription is \$14 per year; (\$17.50 outside the United States). Single issues are also available at a price of \$2.00 per issue; (\$2.50 outside the United States). Please address subscription or purchase inquiries to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

INITIAL DECISIONS

Initial decisions made in the regional offices are available on microfiche. The microfiche and its indexes may be viewed at any of the Board's regional offices or in the library at the Board's central office. To subscribe to the microfiche "Federal Employee Appeals Decisions" at \$150 per year for microfiche and index, contact the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

PUBLISHED BOARD DECISIONS AND INDEX

Decisions of the United States Merit Systems Protection Board (Volumes 1 and 2) and *Index to Decisions of the United States Merit Systems Protection Board* are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at \$30 for the three-volume set; Stock No. 062-000-00002-3. Covering the period of January 11, 1979 through July 22, 1980, these volumes consist of final actions taken by the Board after the issuance of an initial decision in an appeal from an agency action, Board actions in cases where it has

original jurisdiction, and precedential interlocutory actions. In most cases, the preceding initial or recommended decision is included. The cases are indexed in the accompanying multi-part index volume.

Volumes 3 and 4 (including multi-part index) are available from the Superintendent of Documents at \$24 for the two-volume set; Stock No. 062-000-00009-1. These volumes consist of Board final actions taken under the appellate and original jurisdiction conferred by the Civil Service Reform Act of 1978, and precedential interlocutory actions from July 23, 1980 through December 31, 1980.

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All Board orders, opinions, and indexes may be viewed in the Legal Publications Division, Office of the Secretary. Copies of individual decisions may be obtained by sending a written request to the Office of the Secretary, Legal Publications Division, Suite 1404, 5205 Leesburg Pike, Falls Church, VA 22041. Requests should include appellant's name, docket number, and date of the decision.

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DEFINITIONS

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

Addendum Decision—an addendum decision deals with attorney fees.

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